THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

THE PRESIDENT of the Association represented the Association at the first of a series of joint hearings held by the Codes Committees and the Judicial Conference on the proposed revision of the New York Civil Practice Act and the Rules of Civil Procedure. The purpose of the hearings is to obtain the views of interested persons with regard to the proposed revision which is embodied in 1960 Senate bills 26, 27, 28, 29 and 30 introduced by Senator Austin W. Erwin. The proposals are the result of several years of study by the Advisory Committee on Practice and Procedure under the Chairmanship of Jackson A. Dykman and a staff directed by Professor Jack B. Weinstein of Columbia University.

THE SPECIAL COMMITTEE on the Study of Commitment Procedures, Allen T. Klots, Chairman, held a meeting on September 19 at the Central Islip State Hospital.

AT ITS MAY MEETING the Committee on Law Reform, William L. Lynch, Chairman, had as its guest Presiding Justice Bernard Botein. The Committee discussed with Mr. Justice Botein the

suggestions he made in his Cardozo lecture, "The Future of the Judicial Process: Challenge and Response."

AT ITS JUNE MEETING the Committee on International Law, John R. Stevenson, Chairman, adopted the following resolution:

> "WHEREAS the United States national group charged with the responsibility under the Statute of the International Court of Justice for making nominations of candidates for election to the International Court of Justice is currently considering the nomination, on behalf of the United States, of not more than four persons, of whom not more than two shall be United States nationals,
>
> "The Committee on International Law of The Association of the Bar of the City of New York recommends that such national group give due consideration to the nomination of Philip C. Jessup whose experience and professional accomplishments in the international law field would make him an outstandingly qualified nominee for election to the International Court of Justice."

AT ITS LAST MEETING in April the Committee on Admiralty, W. Mahlon Dickerson, Chairman, had as its guest Judge John R. Bartels of the United States District Court for the Eastern District of New York. At the meeting there was a general discussion of recent decisions by compensation boards and opinions rendered in seamen's personal injury cases.

The Committee also has extended the congratulations and felicitations of the Committee to the English Court of Admiralty on the occasion of the Sixth Centenary of that court.

THE COMMITTEE on Uniform State Laws, Lester E. Denonn, Chairman, will undertake a study of the Uniform Commercial Code, with particular references to the criticisms of the Code

made by the New York Law Revision Commission and the amendments made in the Code in the light of such criticisms.

THE COMMITTEE on Trade Marks and Unfair Competition, Walter H. Free, Chairman, has under consideration proposed amendments to Article 24 of the New York General Business Law to permit the registration of service marks. The Committee also is studying legislation which would amend various provisions of the Lanham Act.

AT ITS September meeting the Section on Wills, Trusts and Estates, Edward Ridley Finch, Jr., Chairman, had as its speaker P. Hodges Combier, Assistant Attorney General of the State of New York, who discussed "Charitable Trusts." The Chairman of the Section reviewed recent decisions.

AMONG MATTERS being considered by the Committee on Foreign Law, James G. Johnson, Jr., Chairman, are amendments to the Foreign Agents' Registration Act and legal problems connected with export guarantees.

CAROLINE K. SIMON, Secretary of State, has directed the Bar's attention to increases in certain fees payable to the Department of State authorized by the last session of the legislature. The increased fees are effective as of July 1, 1960. The schedule of fees applicable to the Division of Corporations is as follows:

FILING CORPORATE AND OTHER CERTIFICATES†

Certificate of Incorporation (all corporations)	$ 50
Amendment or Restated Certificate	30
Consolidation and Merger	30
Dissolution	10
Certificate of Designation or Change of Address	5
Certificate of Election of Trustees	30

† Organization Tax on shares not included.

Certificate of Joint Stock Association	30
Statement and Designation by Foreign Corporation	110
Amendment or Surrender of Authority by Foreign Corporation	30

SERVING PROCESS

*Foreign Corporation	$ 10
*Domestic Corporation (action under $200 and action by municipalities	5
*Domestic Corporation (others)	10
*Joint Stock Association and Business Trust	10
Motor Vehicle and Aircraft	5

CERTIFICATES ISSUED, ETC.

Certificate as to Consolidation or Merger	$ 30
Certificate as to documents on file, status of corporations, etc.	5
Affixing the Great Seal of the State	5
Reservation of Name for Change of Name	5
Certified Copy (Photocopy) 50¢ per page plus	2
(Furnished Copy) $1 per page plus	2
Uncertified Photocopy of Filed Document, per page	.50

THE XIITH CONFERENCE of the Inter-American Bar Association will be held in Bogota, Colombia, January 27 to February 3, 1961. Information as to the conference may be obtained from William Roy Vallance, Secretary General, 1129 Vermont Avenue, Washington 5, D.C.

THE PRACTISING LAW INSTITUTE has recently published a new edition of its monograph, "Building a Practice," by the Institute's founder and director, Harold P. Seligson. The monograph has been completely revised and considerably expanded and is designed to help lawyers increase their professional income. The book is priced at $2.00 and is included in the Institute's monograph series on General Practice, which is priced at $20.00. A detailed catalog of Institute publications is available on request from the Institute, 20 Vesey Street, New York 7.

* Mailing charges in excess of $2.00 to be added.

THE FIRST VOLUME of a new official compilation of the Codes, Rules and Regulations of the departments and agencies, State of New York, will be off the press in October. Announcement that this new compilation is in actual publication has been made by Attorney General Louis J. Lefkowitz on behalf of himself and Caroline K. Simon, Secretary of State, who has, by provision of the Executive Law, the responsibility for publication of the rules and regulations.

The new compilation will be a loose leaf set of about 20 volumes. Each volume will cover several state departments, taking the departments in alphabetical order. Following the first volume, others will appear periodically. It is expected that the set will be completed within a year. Monthly supplements will be issued so that all rules and regulations will be published within a month after they are promulgated. The monthly mailings will commence for all volumes as they are published, even while the set is being completed.

The Calendar of the Association for October and November

(as of October 3, 1960)

October	3	Dinner Meeting of Committee on Medical Jurisprudence Dinner Meeting of Committee on Professional Ethics
October	4	Dinner Meeting of Committee on the City Court of City of New York Meeting of Committee of the Judiciary Dinner Meeting of Committee on Administrative Law Dinner Meeting of Committee on Art
October	5	Dinner Meeting of Executive Committee
October	6	President's Reception for Committee Chairmen Meeting of Committee on Legal Aid
October	10	Dinner Meeting of Committee on Insurance Law Dinner Meeting of Committee on Housing and Urban Development
October	11	Dinner Meeting of Committee on Real Property Law
October	13	Meeting of Committee on Trade Regulation
October	18	*Stated Meeting of the Association,* 8:00 P.M., *Buffet Supper,* 6:15 P.M. Meeting of Committee on Arbitration
October	19	Meeting of Committee on Admissions Dinner Meeting of Committee on Copyright Dinner Meeting of Committee on Courts of Superior Jurisdiction
October	20	Dinner Meeting of Committee on International Law
October	24	Meeting of Library Committee
November	2	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates

November 9 Dinner Meeting of Committee on Legal Aid

November 10 Dinner Meeting of Committee on Professional Ethics

November 14 Dinner Meeting of Committee on Housing and Urban Development

November 15 Meeting of Committee on Arbitration

November 16 Meeting of Committee on Admissions
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Dinner Meeting of Committee on Foreign Law

November 17 New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee

November 18 New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee

November 21 Dinner Meeting of Committee on Medical Jurisprudence

November 22 Meeting of Committee on the Domestic Relations Court
Dinner Meeting of Committee on Aeronautics

November 28 Meeting of Library Committee

November 29 Meeting of Section on Trade Regulation

The President's Letter

To the Members of the Association:

During the first twelve days of September the Bench and Bar of New York City had the honor and pleasure of entertaining over 1,250 British judges, barristers, solicitors, and their families. Many of our guests were provided with hospitality in the homes of nearly 600 New York lawyers—an unprecedented example of British-American friendship. Arrangements for these visits to American homes were made by a devoted group of volunteers and a special staff. The formal entertainment program was organized by the Greater New York Committee for the Entertainment of English Lawyers, headed by our past president, Dudley B. Bonsal, and composed of representatives of the Association, the five County Associations and the New York State Bar Association.

Among the events provided for the entertainment of our English visitors were a tour of Brooklyn as guests of the Brooklyn Bar Association, luncheon parties given by insurance companies and banks, a tea at the United Nations given by the New York Women's Bar Association, a colorful reception and dance at the House of the Association (attended by some 1,400 guests and their hosts), a breakfast and fashion show, a garden party at Gracie Mansion tendered by the Mayor and Mrs. Wagner, a luncheon held at the New York County Lawyers' Association, special tours of the United Nations and an open house at the Carnegie Endowment for International Peace. A wide variety of smaller parties were given by law firms and individual lawyers.

Presiding Justice Bernard Botein and the members of his Court held a special session of the Appellate Division, First Department, at which Viscount Kilmuir, the Lord Chancellor, Lord Evershed, the Master of the Rolls, and Chief Judge Charles S. Desmond sat with the Court. At a special convocation, Columbia University conferred honorary degrees on the Lord Chancellor, the Master of the Rolls, President Whitney North Sey-

mour of the American Bar Association and Professor Elliott E. Cheatham. The American Arbitration Association and some 25 law firms held open house for several days and a hospitality room was provided at the House of the Association throughout the twelve day visit.

I would like to thank personally all the lawyers and wives who cooperated with the Greater New York Committee in providing entertainment for our guests. However, the number of these generous people is too great for me to do this. They must know that their efforts were deeply appreciated by the Committee and that their English guests have expressed warm thanks for the hospitality accorded them.

Hearty thanks and praise for a superb performance are also due to each member of our staff and to the charming wives of our members, who as volunteer workers and hostesses at the House of the Association, gave so generously of their time. The visit was a memorable occasion for all of us and we sincerely hope that our guests enjoyed themselves as much as we did.

ORISON S. MARDEN

September 15, 1960

Report of the President

1959–1960

I am glad to report that my final year as President of the Association was another useful year in our history. This is best brought out in the full reports of our committees which will be published as a supplement to the October RECORD and which, I trust, will be read by our membership.

Certainly one of the outstanding events of the past year was the brilliant Cardozo lecture delivered by Presiding Justice Botein in February. Justice Botein's lecture, entitled "The Future of the Judicial Process: Challenge and Response," calls upon the legal profession to plan ahead so that the processes of the administration of justice will meet the dramatic challenges posed by the rapidly development scientific age.

I cannot help but wonder whether Judge Botein would not agree that to meet this challenge will require greater learning, wisdom and understanding on the part of our judiciary than has been needed in the past. I emphasize this because the past year of our Association might well be termed "judicial selection year."

Last August we made an arrangement with the leaders of the major parties that they would submit to our committees the names of prospective judicial candidates at least two weeks in advance of final designation or nomination. The purpose of this arrangement was to implement the program initiated by my predecessor, Mr. Louis M. Loeb, designed to assist the political parties in designating the best qualified men for judicial office and not leaving the Association in a position where the only choice was between candidates already nominated or designated. While I have no doubt at all in the sincerity of the leaders in their desire to carry out this arrangement, it becomes increasingly clear that intra-party political considerations will often make it difficult for them to do so.

At the October meeting the recommendations of our commit-

tees on candidates for judicial election were overruled by the membership in two instances. This poses a problem of policy, because at these meetings our committees are not in a position to disclose information received in confidence or the source of such information. And so, in the debate at the October meeting, the committees were at a disadvantage in endeavoring to meet the arguments of the friends of the candidates involved.

At the Special Meeting in March the Chairman of the Criminal Courts Committee, Mr. Arthur H. Christy, outlined in considerable detail the procedure under which that Committee had reached its decision, which decision was overwhelmingly sustained by the membership.

Recently the Mayor saw fit not to follow the views of our Association and those of the New York County Lawyers' Association in making an appointment to the Magistrate's Court. This is, of course, the Mayor's prerogative as he bears the sole responsibility for making appointments.

Our Judiciary Committee is continuing to explore ways and means of making our procedures even fairer and better than they are today so that there will be no reason for a repetition of the events of the past year. However, I should like to suggest here that if the goals set by Presiding Justice Botein are to be met it is not only a matter of seeking to make the present system work better; we should also determine whether that system is the best one that can be devised to raise the standards of the judiciary.

Our Association has been in the lead in many things but this cannot be said of our work on the vital matter of judicial selection. Here other Associations in other states have taken the lead while we have been satisfied to continue a system inherited from a different kind of a community in a different age.

It is the judges who make the rule of law and it is the rule of law upon which we depend to safeguard the future of our community. Judges must be independent. They must not be beholden to the Executive or to the Legislature or to any political or other group.

When judicial selection was discussed in India a little over a

year ago by a world congress of lawyers called together by the International Commission of Jurists, the congress was of the view that this independence would best be obtained if judges were appointed for life, subject only to good behavior. I am not saying that an appointive system is necessarily the best, though I do believe that by and large the federal system of appointed judges has been more effective than the elective system followed in this and other states. Moreover, the elective system has run into considerable criticism recently. Some of you will have read an editorial in the February, 1960 edition of the Journal of the American Judicature Society which states that in Chicago elected judges must pay political parties for their jobs and if, as is often the case, they cannot afford to make the required payment they borrow it from the very lawyers who will appear before them after they are elected. Also in the recent book, *Governing New York City,* written by Professor Wallace F. Sayre and Professor Herbert Kaufman and published by the Russell Sage Foundation, it is suggested that a similar practice may obtain in our city. Surely such a practice would militate against the independence of the judiciary and this is particularly true where there is a promotion system such as we have where an elected judge in one court seeks promotion by being elected to a higher court.

And so I believe that the time has come—indeed, is long overdue—when our Association should take the lead in again reviewing the process by which our state and city judges are selected and considering whether any of the other plans used elsewhere in our country or, indeed, whether a new system to be devised might not be better suited to giving us a judiciary which would make our rule of law second to none in the world. I cannot close this part of my report without referring to the good work of the Committees charged with reviewing judicial selections. I refer to the COMMITTEE ON THE JUDICIARY, the COMMITTEE ON CRIMINAL COURTS, LAW AND PROCEDURE, the COMMITTEE ON THE CITY COURT OF THE CITY OF NEW YORK, the COMMITTEE ON THE MUNICIPAL COURT OF THE CITY OF NEW YORK and the COMMITTEE ON THE DOMESTIC RELATIONS COURT. It was a year attended

with unusual problems, and they lived up to the best traditions of the Association.

In his last report the Treasurer noted that our membership has gone over the 7,000 mark for the first time in our history. This is gratifying because, as you know, we concentrate on maintaining the high standards of our membership and not on numbers alone. This increase in our membership is not an unmixed blessing from the point of view of the President. With 7,000 members and only some 1,000 committee posts, it can be readily understood why the President is not able to meet every request for committee assignments. Although we do the best we can, there are bound to be disappointments. We try to make the rotation system work in such a way that as many committee requests as possible can eventually be complied with.

Our COMMITTEE ON ADMISSIONS continues to do a splendid job, which becomes necessarily more onerous as our membership increases. During the past year, in addition to its regular labors, the Committee adopted substantial revisions to its regulations designed to simplify our admissions procedures, and particularly the procedure for transfer from Auxiliary to Active membership. Our COMMITTEE ON INCREASE OF MEMBERSHIP also deserves great credit for the substantial increase of members which we have enjoyed during the past year.

Thanks to the cooperation and hard work of the YOUNG LAWYERS COMMITTEE, we inaugurated two new programs during the year. In cooperation with the Columbia Broadcasting System, we are sponsoring the television program, "New York Forum," which appears every Sunday afternoon on Channel 2. These programs, which feature a prominent guest who is examined on issues of public importance by a panel of three of our younger members, have been well received by the public. They also provide a unique opportunity for the younger members of the Association to take part in a public forum. I have been asked why only our younger members serve on these panels, and I should report to you, as I reported to the Annual Meeting, that when we negotiated our contract with C.B.S. this was made a condition.

It was the view of some of the C.B.S. executives that when a lawyer becomes as old as your President he usually has forgotten how to ask questions—he can only make statements. While I am sure most of us would disagree with this, we felt the endeavor so worthwhile that we were happy to conclude the arrangement.

Again, through the YOUNG LAWYERS COMMITTEE, we have inaugurated charter flights to Europe for our members and their families. Two successful flights were sponsored last year and three were sponsored this year. The rates are low so that many of our members have enjoyed a vacation in Europe with their families who could not otherwise have done so.

As usual, the Young Lawyers Committee sponsored the National Moot Court Competition, which was participated in by 98 law schools. The final rounds were held in December, and the competition was won by Willamette University College of Law of Salem, Oregon. This competition does much to stimulate friendship and a sense of common purpose among law students throughout the country and cannot help but benefit the organized Bar of the future.

Our distinguished SPECIAL COMMITTEE ON THE FEDERAL CONFLICT-OF-INTEREST LAWS, under the Chairmanship of Roswell B. Perkins, completed its report during the current year. The report embodies important recommendations in the area of conflicts-of-interest in the Executive Branch of our Federal Government and includes a model statute on the subject. This report was made available to the Congress, which is considering this important subject, and, in addition, received wide publicity and acclaim throughout the country. It was gratifying to read the editorial comment on this Committee's report, most of which was favorable. Because of the election, no legislation on the subject is expected this year, but we are confident that the favorable reception which the report has received in Congress and throughout the country will pave the way to many of its recommendations being eventually enacted into law. The report has been published by the Harvard University Press and I am sure that you

will agree with me that it reflects great credit on the Special Committee and on our Association.

The COMMITTEE ON ADMINISTRATIVE LAW has also been active in the federal field. The Committee reviewed and implemented its earlier report concerning the revision of the Administrative Procedure Act and the proposed establishment of an Office of Federal Administrative Practice with an independent corps of hearing examiners. The Committee also concerned itself with legislation before Congress to establish standards of conduct for agency hearings, and has suggested certain changes to the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. Acting on the request of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, a Subcommittee has been considering the much publicized report on the Civil Aeronautics Board which former Commissioner Louis J. Hector made to the President at the time of his resignation. The Committee met with Commissioner Hector to discuss his views and suggestions.

On the state level, one of the principal projects which the Committee has undertaken and on which work will continue during the coming year concerns the proposals made by William Ronan, Secretary to the Governor, for a revision of the administrative structure of the State's Executive Department. The Committee is continuing its study of the proposed revisions of Article 78 of the Civil Practice Act as they relate to judicial review of administrative determinations. In cooperation with other bar associations, the Administrative Law Committee was instrumental in the adoption and approval of legislation previously vetoed requiring state agencies to send notices of hearings to attorneys of record and in the achievement of adequate appropriations to permit and require the publication by the Department of State of the rules and regulations of state administrative agencies.

Again, in the federal field, our COMMITTEE ON TRADE MARKS AND UNFAIR COMPETITION completed a four-year study in the field of unfair competition. As a result of its study, the Commit-

tee prepared a statute which has been introduced into Congress by a distinguished member of our Association, John V. Lindsay. This proposed legislation would enable private persons to seek direct relief in the courts in such matters instead of having to depend upon governmental action. It is designed to create a new remedy to deal with unfair competition and other injurious commercial practices on a uniform, nation-wide basis.

The COMMITTEE ON PATENTS was represented at hearings before the Patent Subcommittee of the Committee on Science and Astronautics of the House of Representatives on the patent provisions of the National Aeronautics and Space Act of 1958. Mr. William H. Davis, a Vice President of the Association, represented the Committee at the hearing and set forth the Committee's view that the interest of the United States would best be served if the contractor would retain title to all inventions made under the National Aeronautics and Space Act of 1958 and if the administrator retained for the government only a non-exclusive royalty-free license.

As a result of the continuing efforts of the COMMITTEE ON COPYRIGHT, a Copyright Publications Center for the eastern part of the United States has been established at the New York University Law School, which should prove most useful to scholars and others interested in copyright matters in this part of the country. The Committee continued its review of important litigation in the copyright area and, in cooperation with the Committee on Taxation, has been active in tax matters affecting copyright royalty income. The Committee continued to concern itself with pending legislation in the field of copyright and literary property and was particularly active in the consideration of proposed legislation to protect designs, including the so-called "Design Protection Act." The matter of a general revision of the Copyright Law also commanded the attention of the Committee.

The principal federal tax activity which concerned our COMMITTEE ON TAXATION related to the Trust and Partnership Income Tax Revision bill of 1960. This bill, which was passed by

the House of Representatives, makes many technical revisions in the federal income tax provision relating to estates and trusts and their beneficiaries and to partnerships and their members. In April the Chairman of our Committee appeared before the Senate Committee on Finance to present the views of his Committee. These views were set forth in the printed hearings on the bill. The Committee's chief New York tax activity was its report on the bill which adopted the provisions of the federal Internal Revenue Code for the purpose of determining taxable income under the New York personal income tax. The Committee's favorable report on this legislation was published in the bulletins of the Committee on State Legislation. Many of the Committee's suggestions were incorporated in the conformity legislation as finally enacted.

The COMMITTEE ON FEDERAL LEGISLATION has had an exceptionally busy year. In May the Chairman testified before and submitted a prepared statement to the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee urging approval of legislation introduced by Senator Javits which would amend the judiciary clause so as to eliminate the possibility of Congress' depriving the Supreme Court of appellate jurisdiction as to law or fact in cases arising under the Constitution. The proposal has been actively sponsored by the Association for some years.

Our members will recall the resolutions relating to the Supreme Court which were adopted by the House of Delegates of the American Bar Association based on the report of that Association's Special Committee on Communist Tactics, Strategy and Objectives. The Committee obtained the preparation of an able and scholarly study of these resolutions and of the accompanying report on the basis of which it took issue with these resolutions which had indicated that the Supreme Court had been found wanting in diligence in protecting the security of the nation. Our Committee concluded, "There is no foundation for any intimation that the Supreme Court has acted in disregard

of the security needs of the nation." The study and our Committee's report have been accorded wide publicity and favorable comment.

The Committee also prepared and issued a report on the much debated topic of presidential disability. The Committee concluded that a constitutional amendment such as that proposed in S. J. Res. 40 providing for the determination of the commencement and termination of any presidential disability as the Congress shall by law provide affords the best means for dealing with the question. The remaining provisions of S. J. Res. 40 the Committee suggested should be included in implementing legislation after the adoption of the proposed constitutional amendment.

The Committee also endorsed the objectives of legislation that would amend the Constitution to give residents of the District of Columbia the right to vote in Presidential elections and to elect delegates to the House. The Committee, however, recommended full representation in both the House and the Senate.

Joining with the Committee on the Bill of Rights, the Committee on Federal Legislation endorsed the objectives of legislation providing for the appointment of registrars to protect the right to vote and the bill of the Attorney General which would extend similar protection through referees in state as well as federal elections. The Committee also approved legislation proposed by Senator Javits which provides for representation of indigent defendants in criminal cases.

A Special Committee on Banking was inaugurated during the year. Although New York City is commonly reputed to be the banking center of the world, this Association heretofore has had no Committee to deal with the legal problems in this important area. The Special Committee has already established and is maintaining close liaison with the Committee on Laws and Practices of the Banking Laws Section of the New York State Bar Association and with the Banking Committee of the American Bar Association. During the legislative session the Special Committee worked closely with our Committee on State Legislation which

referred to the new Committee bills affecting banking or financial institutions. In addition to attention devoted to legislation the Committee has under way a number of long term projects.

The COMMITTEE ON CORPORATE LAW was given jurisdiction during the year over matters relating to the regulation of securities and securities exchanges. The Committee has considered new rules proposed by the Securities and Exchange Commission and has forwarded comments thereon to the Commission. The Committee continued to devote the major portion of its time to the revision of the New York corporation laws. After four years of study the Joint Legislative Committee to Study Revision of Corporation Laws has recommended a new unified business corporation law which was introduced in the 1960 legislature for study purposes only. Our Committee has worked in very close cooperation with the Joint Legislative Committee and its staff. Each report and draft issued by the research staff of the Joint Committee received study by our Committee. Our Committee has also continued its close cooperation with the Committee on Corporation Law of the New York State Bar Association. Thirteen subcommittees of our Committee are now studying in detail the legislative text of the proposed business corporation law and their comments will be reviewed by the full Committee in preparation for public hearings to be held by the Joint Legislative Committee in the early fall.

Our SPECIAL COMMITTEE ON FAMILY LAW during the past year collated and analyzed the results of a questionnaire as to the proper function of social workers attached to a family court which had been circulated among various experts in the social work field. In addition, in view of the fact the Family Part has now been in operation for almost five years, the Committee decided that a comprehensive reexamination of the operations of the Part was now warranted in order to measure its performance against the objectives which led to its establishment. As a preliminary phase of the study, the Committee has been analyzing adjudicated cases which have been channeled through the Part since its inception. Unfortunately the scope of this important

examination has been somewhat restricted by the inability of the Committee to obtain access to the sealed court files or to various records of the social case worker attached to the Family Part. The Committee nevertheless feels that it will be able to list valuable information from the sources now being made available to it. As an interesting incidental aspect of this study, statistical data is being compiled which will be used in an effort to ascertain and evaluate the facts which influence the amount of allowances of temporary and permanent alimony and counsel fees in matrimonial actions and to ascertain whether, as is often suggested, the courts follow certain "rules of thumb" in making such determinations. The Committee also considered approximately 40 bills which related to its field of activity. Reports on five of these bills were prepared for submission to the legislature through the Committee on State Legislation. Special reports to the Governor on an additional six bills were prepared during the ten and thirty day periods. The Chairman of the Committee appeared as a witness at a hearing held by the New York Joint Legislative Committee on Matrimonial Laws (Gordon Committee) for the purpose of reporting the views of the Committee on legislation proposed by the Joint Committee in the fields of adoption and marital conciliations. The Committee is also considering whether the Joint Legislative Committee on Matrimonial Law, which was created with the approval and assistance of this Association, is effectively performing the functions for which it was created or whether this Association should propose the creation of a new body, perhaps a special commission appointed by the Governor, to make a basic reevaluation of the laws governing divorce in this state.

Of eight bills approved by the Committee, five were enacted into law. Perhaps the most significant of these was an interstate compact on the placement of children, which represents a pioneering effort by the State of New York in this field. Of the three bills disapproved by the Committee, only one was passed by the Legislature and signed by the Governor. The reports prepared by this Committee disapproving certain features of a proposed

revision of Article 7 of the Domestic Relations Law, which governs adoptions, were cited by the Governor in his veto of that measure.

At the start of the year Miss Florence Kelley was functioning in her usual efficient way as Chairman of our COMMITTEE ON THE DOMESTIC RELATIONS COURT. Midway Miss Kelley was appointed the Presiding Justice of Domestic Relations Court, an appointment which received the enthusiastic support of all who are interested in the welfare and the improvement of this most important court. The Committee, under her able successor, has continued to examine the role of the lawyer in that court, the court's personnel needs, and the new problems that will confront the court when court reorganization is finally achieved.

The COMMITTEE ON LEGAL AID has continued to struggle with the problem of securing counsel for indigent defendants in Federal Court where the Legal Aid Society for some reason, such as conflict-of-interest, cannot act for more than one defendant. No satisfactory solution to this problem has yet been achieved. Pursuant to the recommendation made by the Committee last year, a Subcommittee has explored ways and means whereby the Legal Aid Society or a public defender system might receive financial aid from federal, state or local funds. As a result of this study, the Committee has concluded that the best solution would be to attempt to secure public funds for the Legal Aid Society in preference to the initiation of a public defender system or the increased use of assigned counsel. The Chairman of the Committee and some members of the Committee have also served on a Special Committee of the Association having a closely related purpose. The purpose of the Special Committee is to visit the Magistrates' Courts in New York City for the purpose of observing the legal representaion of indigent defendants in those courts.

In the international field our COMMITTEE ON INTERNATIONAL LAW focused its attention on one of the great issues of the day: the question of the repeal of the so-called Connally Amendment. Under the Connally Amendment the United States reserves the right to determine whether any proceedings pending before the

International Court of Justice in which the United States is involved are properly before that Court, or whether they are matters of domestic jurisdiction. It has been urged that the Connally Amendment should be repealed on the ground that there cannot be an international rule of law unless the International Court of Justice has full jurisdiction to determine what cases are properly before it under the charter of the United Nations. The Committee considered the matter with great care and prepared a report favoring the repeal of the Connally Amendment. It also presented a resolution favoring repeal which was approved by the Association at the December Stated Meeting, thereby reaffirming the position which the Association first took in 1948. The Chairman of the Committee, Mr. John R. Stevenson, testified in support of the Association's resolution favoring repeal at the hearings which were held before the Senate Foreign Relations Committee. Also at the December Stated Meeting the Association approved a resolution presented by the Committee favoring consultation (1) by the national group charged with making nominations, on behalf of the United States, of judges of the International Court of Justice and (2) by the United States government in making appointments or nominations to other positions requiring competence in international law, such consultation to be with members of the United States Supreme Court, national associations having competence in the field, and leading professors of international law. The lead taken by our Association has since been followed by a number of other associations.

Also in the international field the COMMITTEE ON FOREIGN LAW has been no less active. It devoted its principal attention to consideration of legal problems attendant upon the European Common Market and pertaining to the emergence of the new nations of Africa. It also dealt with the securities laws in foreign countries and legal questions arising out of trade with the Soviet Union and other Communist countries. The Committee embarked on a successful educational program with respect to the European Common Market sponsoring, with others, a three-day meeting in Washington in February and a symposium in the

same month at the House of the Association, in which members of the Commission and staff of the European Common Market participated. It sponsored a discussion in December of the securities regulations of the United Kingdom and other countries of Western Europe in which the Securities and Exchange Commission was represented by Mr. Emanuel Cohen, Special Adviser, and Mr. Harry Heller, Deputy Chief of the SEC's Division of Corporate Finance. Another public symposium was sponsored in April on "Soviet Law and East-West Trade." The Committee is following up a request of the Executive Committee in investigating the possibilities of a program for the exchange of lawyers between the United States and Soviet Union which would come under the Cultural Exchange Agreement which the United States has with that country.

Chief Judge Ryan of the United States District Court for the Southern District of New York brought to the attention of the Association the overwhelming burden under which the judges of his court are laboring by reason of lack of judicial manpower. Our COMMITTEE ON COURTS OF SUPERIOR JURISDICTION prepared a report on this subject and its Chairman, Mr. Walter R. Mansfield, appeared before the House Judiciary Committee to make a plea for an additional six judges for the Southern District. My successor is continuing to follow this matter closely and in cooperation with other bar associations we are exerting every appropriate effort to the end that this serious condition in the Southern District will be relieved as soon as possible.

The Committee on Courts of Superior Jurisdiction has also been engaged in a continuing study of pre-trial procedures in the Federal District Courts and the State Supreme Court in the New York City area with a view to determining what improvements may be made in the handling and disposition of cases before trial. The importance of this study is emphasized by the fact that in the Southern District only about 8% of all actions instituted actually reach trial. Among the numerous suggestions for improvement that the Committee is considering are: more extensive use of medical panels; mandatory pre-trials where notice to

admit has been served and the parties are unable to agree on facts proposed for stipulation; use of pre-trial conferences (in lieu of formal motions) to resolve such issues as priority and scope of examinations before trial and interrogatories; more widespread assessment of attorneys' fees against a party failing to stipulate facts which are later proved; and more trials of separate issues as a means of avoiding protracted trials of all issues. The Committee has almost completed its study of the trial assignment and jury problem in the Supreme Court of Kings County.

Our Special Committee to Cooperate with the International Commission of Jurists was well represented at the Congress in New Delhi held in January, 1959, to which I have previously referred. The Commitee under its Chairman, Mr. Bethuel M. Webster, a past President of the Association, has been engaged in implementing the Declaration of Delhi and the other resolutions which were adopted at this Congress. The Committee is assisting the International Commission of Jurists in the comprehensive survey which is being undertaken to ascertain to what extent existing institutions, principles and legal procedures in the various countries of the world meet the standards of the Delhi resolutions. In addition, the Committee has sponsored a series of meetings between members of our Association and leading judges and lawyers from other lands, with a view to informing them as to the International Commission of Jurists, as well as furnishing them information as to American legal institutions. To commemorate the Congress in Delhi, Mr. Webster arranged to have presented to the library of the Supreme Court of India by the American Ambassador on behalf of the American delegation a gift of leading American texts on constitutional law, civil rights and legal institutions in our country. I am also glad to report that Mr. Benjamin R. Shute, a former Chairman of this Committee, has been elected a member of the International Commision of Jurists.

The work of a number of our "old line" committees requires special mention. I again urge the reading of the annual reports of all committees because space limitations prevent me here

from recounting the full extent of their fine accomplishments. Under the Chairmanship of Mr. Sheldon Oliensis our COMMITTEE ON STATE LEGISLATION continued its outstanding job during the year. There is no doubt at all that the Legislature, as well as the Governor during the 30-day period, has been greatly assisted by the reports of this Committee and the Governor on a number of occasions has so stated. Both the Committee and I are greatly appreciative of the full cooperation given to us by the very able counsel to the Governor, Mr. Robert MacCrate.

The COMMITTEE ON GRIEVANCES continues to operate with its usual efficiency despite the continuing increase in its burdens. During the past year it considered 1,702 new complaints, representing an increase of 157 over the preceding year. The Committee lost the services of Mr. Frank H. Gordon who resigned to enter private practice after more than ten years of devoted work as Attorney in Chief to the Committee. This was a severe loss because, as Judge Peck states in his report, Mr. Gordon gave dynamic leadership to the staff of the Committee. We have been fortunate in securing the services of Mr. Eric Nightingale as successor to Mr. Gordon, who has already taken hold of his responsibilities with energy, imagination and devotion.

The COMMITTEE ON THE SURROGATES' COURTS continued its support of legislative reform in its field. It collaborated with the Law Revision Commission in the drafting of six bills aimed to round out the revision of the rules relating to perpetuities and accumulations. In collaboration with the Surrogates' Association and our own Special Banking Committee, a bill was drafted relating to payments to foreign fiduciaries. The Committee participated in the drafting of a bill granting a $2,000 New York estate tax exemption for real and tangible property, situated in this state, of a non-resident decedent. All of these bills became law. The year also saw the completion of the Committee's program successfully initiated three years ago and continued last year and this year as a result of which reforms in the laws relating to perpetuities and accumulations, which had been unsuccessfully sought for over a century, have at last been accomplished.

In addition, the Committee considered the formulation of bills relating to so-called "pour-overs" from wills to inter vivos trusts, the so-called "prudent man rule" in relation to fiduciary investments, statutory regulation of the appointment of corporate dividends and other distributions between trust, principal and income and other subjects which will form the basis of the Committee's work in the future. The Committee continued the pleasant annual tradition of entertaining the surrogates of the metropolitan area at an informal dinner held at the House of the Association.

I reported last year that the COMMITTEE ON REAL PROPERTY LAW had started work on the proposed new zoning resolution of the City of New York. During the year it conducted a number of studies by different members of the Committee which were collated into a full report with recommendations for changes in the new zoning resolution. At the urgent request of the City Planning Commission, the Committee submitted its report to the Commission as an advisory opinion not necessarily representing the views of the Association but rather the considered opinion of technical experts. This report was studied by the Commission's staff and the Commission adopted many of our Committee's suggestions. Upon the publication of the official proposed resolution of the City Planning Commission in December, our Committee restudied the resolution with particular reference to changes made in the consultant's proposal which had been the subject of the previous study. The Committee prepared a formal report which, with the approval of the Executive Committee, was given wide press notice and the Chairman of our Committee appeared at the public hearings to voice the Association's approval of the proposed resolution. If the resolution is approved by the Board of Estimate, our Committee will have contributed in no small measure to the enactment of a law which is of great significance to the future of our city. Another major study of the Committee with long-term significance was undertaken to assist the state division of housing in the preparation of legislation to further the Governor's middle income housing program. The

1959 legislation had a number of defects seriously affecting the practical operation of the program. New legislation was formulated and sponsored by the state housing division and became law on April 18, 1960. Our Committee also gave substantial technical assistance in the setting up of a state housing finance agency to provide an addition half billion dollars of mortgage funds for the construction of new middle-income housing. This legislation was hailed by the Governor in his approval message as "the first of its kind in the nation, designed to meet one of the most significant problems of urban society—the need for housing for middle income families." The Committee drafted and sponsored seven bills in the Legislature. Of these, one died in the Legislature; three passed both Houses but were vetoed by the Governor; and three were enacted into law. Detailed information on these bills will be found in the Committee's annual report. Continuing its successful educational program, the Committee held a well-attended symposium on the subject of "The How and Why of Title I." Two members of the Committee and the former Chairman of the Committee participated as panelists, as well as the Regional Administrator of the Housing and Home Finance Agency of the United States and the Deputy Mayor of the City of New York.

The SPECIAL COMMITTEE ON RENT CONTROL LAWS has also made important contributions to the more effective administration of laws which have far-reaching effect on the future of the city. The Committee has enjoyed the fullest cooperation of the Rent Administrator and the members of his staff. The Committee has considered such matters as the simplification of methods of supplying data required to establish "sales price" as the "valuation" for computing rent increases and the adoption by the Administrator of a definition of a "cooperative corporation" or "association" and amendments to existing regulations relating thereto. The Committee has continued to confer with the New York State Society of Certified Public Accountants looking toward joint recommendations for the improvement in an expediting of the auditing and accounting procedures of the Rent

Commission. The Committee has embarked on a comprehensive study of practices and procedures in the Rent Commission with those of other administrative agencies.

The COMMITTEE ON TRADE REGULATION continued to work actively in this field. It submitted a report to the Committee on Judiciary of the House of Representatives in connection with the "Anti-Trust Civil Process Act" which had previously passed the Senate, and arranged to have a member of the Committee available to testify before the House Committee. The Committee found that the new bill substantially met the objections which the Committee had previously asserted, and recommended to the Congress that the new bill be approved. The Committee has also worked closely with the Committee on State Legislation in connection with bills pending before the State Legislature.

The SPECIAL COMMITTEE ON THE ADMINISTRATION OF JUSTICE continued to devote itself to court reorganization, paying close attention to the developments during the year. It will have much more to do as court reorganization becomes a reality, which we confidently expect will be in 1961. The COMMITTEE ON ATOMIC ENERGY, which became a standing committee for the first time, and the SPECIAL COMMITTEE ON SCIENCE AND LAW, were active during the year in considering the legal consequences of developments in these fields. The COMMITTEE ON MUNICIPAL AFFAIRS considered numerous problems affecting the welfare of our City, and the COMMITTEE ON UNIFORM STATE LAWS gave its attention to the desirability of enacting the Uniform Commercial Code in the State of New York. The COMMITTEE ON LEGAL EDUCATION remained available to consider problems in that area.

The SPECIAL COMMITTEE ON MILITARY JUSTICE was very active during the year. It drafted legislation which, if enacted, will effect substantial changes in the Uniform Code of Military Justice. It cooperated effectively with the interested Government departments, the American Legion and the Congress in this connection, and expects to have this legislation introduced into the Congress. The SPECIAL COMMITTEE ON PUBLIC AND BAR RELATIONS was of great value to the officers and the Executive Committee in advis-

ing on public relations problems which came up during the year. The COMMITTEE ON THE BILL OF RIGHTS cooperated with the Committee on Federal Legislation on pending legislation to protect the right to vote, and continued to actively interest itself in the protection of individual rights. The COMMITTEE ON PROFESSIONAL ETHICS considered more than 300 inquiries and issued 55 written opinions, five of which were of sufficient interest to the bar in general to be printed in THE RECORD. The COMMITTEE ON LAW REFORM concerned itself with developments in its field.

The COMMITTEE ON INSURANCE LAW early in the year held a useful meeting at which the guests were the Superintendent of Insurance, his first Deputy, the Minority Leader of the New York Assembly, a member of the Insurance Committee of the State Senate, the Chairman of the Insurance Committee of the Assembly and a member of his Committee. The purpose of this informal meeting was to discuss proposed legislation and to establish liaison between the Legislature and the members of our Committee. The Committee has been seriously concerned that in the casualty field the public is disturbed over its inability to secure adequate automobile coverage and over the widespread practice of cancellation of automobile policies by the carriers. The Committee feels that these problems require an immediate solution and should be solved by the industry and not by the Legislature. As a result of negotiations carried on by the Committee with the Lumbermens Mutual Casualty Company, the Association was able to offer in October to its members lawyers' professional liability policies on advantageous terms.

Under the newly enacted Landrum-Griffin Act, the National Labor Relations Board is authorized to delegate to its regional directors certain of its powers in connection with representation cases. The Board solicited the views of the Association's COMMITTEE ON LABOR AND SOCIAL SECURITY LEGISLATION. The Committee recommended to the Board (subject to minor exceptions) broad delegation of its authority. The Committee also undertook a study of the question of service of process on labor organ-

izations in New York State court actions. The Committee, after reviewing the laws of 48 states, recommended that the General Associations Law be amended so that service of process in the case of labor unions would be sufficient if made upon the union's president, vice-president, treasurer, assistant treasurer, secretary, assistant secretary or managing agent. This report was approved at the December Stated Meeting of the Association. The New York State Labor Relations Act became effective in 1937 and, except for minor matters, has not been amended since that date. The Committee, accordingly, is considering the desirability of amending the Act in order to bring it into conformity with the National Labor Relations Act.

The COMMITTEE ON ARBITRATION devoted its attention to the study of the several drafts of the New York arbitration statute proposed by the Advisory Committee on Practice and Procedures of the Temporary Commission on the Courts. The Committee's recommendations were forwarded to the Advisory Committee early in the year. The topic of the annual symposium of the Committee this year was "The Advantages of Arbitration in the Specialized Fields of Admiralty, Patents and Matrimonial Law."

In March the COMMITTEE ON AERONAUTICS held a successful public forum on space law. The panelists were Dr. Lloyd V. Berkner, Chairman of Space Science Board of the National Academy of Sciences; Major General Don R. Ostrander of the U. S. Air Force; John A. Johnson, General Counsel of the National Aeronautics and Space Administration; and Professor Philip C. Jessup of Columbia University. The Committee plans to continue its activities in this field. Among the Committee's other projects are development of aviation law in the international field, amendments to the Federal Bankruptcy Act and to the Federal Aviation Act of 1958 to facilitate the financing of aircraft purchases; and a study of the conflicting rights of aircraft operators and landowners with respect to the use of air space.

The COMMITTEE ON ADMIRALTY considered the position which the United States should take at the international conference held in 1960 to consider safety of life at sea. It made certain rec-

ommendations proposing changes in the "Regulations for Preventing Collisions at Sea," which were transmitted to the U. S. delegate. The Committee contributed to the library of the U. S. District Court for the Eastern District of New York a number of important works on admiralty law, which contribution was gratefully received by that court.

The COMMITTEE ON MEDICAL JURISPRUDENCE conducted a most interesting educational program for the benefit of our members and the Bar in general. It conducted three well-attended public forums dealing with the following subjects: "Mental Disorder and Abnormality, Criminal Behavior and Criminal Responsibility;" "Blue Cross, the Rising Cost of Hospital Care and Community Health Protection;" and "Law, Social Change and the Sexual Psychopath."

I have already mentioned the Cardozo Lecture delivered by the Presiding Justice and sponsored by the COMMITTEE ON POST-ADMISSION LEGAL EDUCATION. The Committee this year, through its various Sections, sponsored an unusually large number of important and timely lectures. Details of the program are set out in the annual report of the Committee.

The Association's artists and photographers have been busy and productive under the able supervision of the COMMITTEE ON ART. At the Annual Photographic Show held in December, there were over 60 exhibitors and photographic specimens of every variety. At the conclusion of the show the Committee held a dinner for the exhibitors and had as guests a number of critics and artists. At the 15th Annual Art Show there were 63 contributors and 116 exhibits. This is the largest number of contributors to any art show sponsored by the Association. The exhibit included not only paintings but also sculpture, woodwork and silver of an unusually high quality. At the dinner following the show the Committee had as its guests distinguished artists, museum directors and critics. The dinner afforded a stimulating opportunity to bring together lawyers interested in art and prominent personages in the museum and art world. I was particularly happy that the Art Committee voted to accept two dis-

tinguished portraits of my predecessors, Mr. Whitney North Seymour and Mr. Louis M. Loeb. The portraits are the work of Mr. Sidney Dickinson and Mr. William Draper, respectively. The Committee also considered matters relating to the disposition of unhung portraits belonging to the Association, the question of art forgeries and legislation to liberalize the tariff laws for art works.

As a result of the work of a Subcommittee of the Executive Committee, under the Chairmanship of Breck McAllister, the Association is giving serious consideration to the holding of public lectures on legal topics which will be of general interest to non-lawyers. In this area there may be a real opportunity to render a further public service.

During the past year we inaugurated a SPECIAL COMMITTEE ON THE STUDY OF COMMITMENT PROCEDURES. This Committee is under the Chairmanship of a former President of the Association, Allen T. Klots, and is carrying forward a program recommended by Presiding Justice Botein and made possible by generous foundation grants and the cooperation of the Cornell University Law School. The Committee will work closely with the Department of Mental Hygiene of the State of New York and includes in its membership Dr. Paul H. Hoch, the Commissioner of Mental Hygiene and two doctors from the Department. The Special Committee has already held several meetings and has organized an able research staff, headed by Professor Bertram F. Willcox of Cornell. The Committee hopes to complete its study and recommendations within 18 months.

I was flattered to be asked by the COMMITTEE ON ENTERTAINMENT to open its 10th Annual Twelfth Night Party with a song. In his comment on my efforts the Chairman of the Committee in his annual report says, "The rest of the evening was classic." I am not quite sure what he means by this but I am completely sure that the guest of honor of the evening, Mr. Morris Ernst, enjoyed himself and I am sure we all shared in his pleasure.

Mrs. Bonsal and I will always remember the superb President's Ball which was sponsored by the Committee and the past Presi-

dents of the Association. We have never seen the House of the Association more attractive than it was on that occasion. A great deal of hard work went into the preparation, and the splendid attendance is the best evidence that the Committee's efforts were greatly appreciated by our members as well.

The final stage in the library renovation project, about which I reported last year, has now been completed by the installation of a new and efficient card catalog in the reading room. This completes the beautiful renovation and makes our library as efficient as any of its kind. Thanks for the card catalog goes to Mr. Chauncey B. Garver, for many years the Treasurer of the Association and who made available for its acquisition monies from the Chauncey B. Garver Fund, which was created in his honor by his many friends.

There are a number of committees, the nature of whose work, while vital to the Association, does not lend itself to detailed reference. I refer to the HOUSE COMMITTEE, the MANAGEMENT COMMITTEE, the COMMITTEE ON INSURANCE OF ASSOCIATION PROPERTY, the COMMITTEE ON THE LAWYERS PLACEMENT BUREAU and the JOINT COMMITTEE (with the New York County Lawyers' Association) ON LEGAL REFERRAL SERVICE, all of whom carried out effective programs in their fields. And I should mention the usually completely unsung COMMITTEE ON INVESTMENTS OF FUNDS, which has done so much for the satisfactory financial condition of the Association. The LIBRARY COMMITTEE continues to give invaluable guidance and assistance to the Librarian. The COMMITTEE ON THE BAR BUILDING loses no opportunity to make that building an ever better asset of the Association. The COMMITTEE ON MEMORIALS compiled a distinguished record of the accomplishments of our departed members for posterity.

During the next year the Association will be occupied by assisting in three major efforts to improve state and local government. I refer, of course, to:

(1) The passage by the 1961 Legislature of the comprehensive plan of court reorganization. During the past year attempts to weaken the plan were successfully resisted and there should be

no doubt but that the plan will have the approval of the 1961 Legislature and be submitted to the voters for their approval. Both in the Legislature and at the time of the referendum, the Association will be vigilant to see to it that this important step toward an improved court system will be achieved.

(2) The "Moore Commission," as this report is written, has planned to submit at an early date plans for revision of the City Charter. Many of our members played an important part in writing the present Charter and I am sure that those with the direct responsibility for a new Charter will look to the Association for help. We should be ready to give that help.

(3) The Special Legislative Committee on the Revision and Simplification of the Constitution has already made several significant reports which have been considered by appropriate committees of this Association. We anticipate that the Commission will make even more important suggestions during the coming year. We have been assured by the Chairman of the Commission, The Honorable David W. Peck, that he would welcome the Association's help in the important work which he has undertaken, and to be of assistance, we have established a special committee under the chairmanship of Timothy N. Pfeiffer, a former Vice President of the Association.

In early September we are to be honored by the visit of some 1,200 British judges, barristers and solicitors who will come to New York following the conclusion of the American Bar Association meeting in Washington. At the time this report was written, the Committee in charge of entertaining our visitors was in the midst of an appeal for private hospitality for the visitors and for contributions to an entertainment fund. Early indications were that the response of our members, as usual, was most generous, and I am sure that everyone will want to make the stay of our visitors as pleasant as possible.

I am grateful to you, the members, for the accomplishments of our Association. In my report last year I referred to the importance of our Stated Meetings and said that I cherished our Association's "town meeting" way of doing business. During the past

year we have had good reason to renew our faith in this democratic way of conducting our affairs. I here record my thanks to our members for their participation in these meetings. I am also deeply grateful to our committee members who have participated in innumerable projects for the better administration of justice and the advancement of our profession. My thanks also go to the Executive Committee and my fellow officers who have supported me during my administration, and I would like to mention in particular our retiring Treasurer, Mr. Dean K. Worcester, whose dedicated service is reflected in the splendid financial condition of the Association. And finally I wish to express my appreciation to our staff who from top to bottom have done a great job for our members and without whose loyal support our program would not be possible.

At the Annual Meeting it was a great pleasure to turn over the gavel to my successor, Orison S. Marden. I know of no one who is better qualified or who has shown greater dedication to the highest principles of our profession and to the work of our Association.

I imagine that most of my predecessors felt as I do at the end of my term; that I have failed to measure up in many ways to the important responsibility with which I have been honored by the membership. However, I think this is inevitable in an Association such as ours, which has been constantly growing in stature and whose influence has spread far beyond the borders of our city. And so I take comfort in the thought that it is in the best interest of the Association that its retiring Presidents can never say that their mission has been accomplished, because in this lies the proof that we are moving forward, and that in the last analysis the true administration of justice must always continue to be a challenge, or it will cease to be an ideal.

DUDLEY B. BONSAL

June 8, 1960

Annual Review of Antitrust Developments

By MILTON HANDLER*

I

In the question period following my 1953 lecture, I was asked whether the change of Administration portended a change of policy in the enforcement of the antitrust laws. Not having any pipeline to the inner councils of the new government, I naturally was unable to answer the question but I did note that the Sherman Act was a Republican achievement and that some of the outstanding trustbusters in our history were Republican Presidents.[1] The question which I ducked in 1953 has been fully answered in the ensuing seven years. Apart from the impressive statistics of new suits instituted,[2] most notable is the fact that the most extreme positions in the history of antitrust have been taken, ironically enough, in an Administration which prides itself on taking the middle course. The trend of current enforcement moves in the direction of the inhospitable jurisprudence of the Fifteenth Century when all restraints on competition were unqualifiedly denounced.[3] This trend is well illustrated by some of the rulings during the past twelve months.

In preparing this lecture, my mind traveled back to the closing years of another Republican administration when I received my first exposure to antitrust while serving as law clerk to Justice Stone. This was the era of *International Harvester*,[4] *General Electric*,[5] *Western Meat Company*,[6] and *Trenton Potteries*.[7] The burning issues in the 1926 term of Court were whether the rule of reason exonerated a price-fixing agreement among competitors where the prices fixed were reasonable,[8] whether control of 64% of the agricultural implements industry constituted monopoly,[9] whether resale prices could be controlled through the expedient

* I am grateful to my colleagues Stanley D. Robinson, Joshua F. Greenberg and Melvin A. Eisenberg for their valuable assistance in the preparation of this talk.

Editor's Note: Professor Handler's review of recent antitrust developments is an annual feature of the Section on Trade Regulation of the Committee on Post-Admission Legal Education. Professor Handler's review was presented at a meeting of the Section on June 9, 1960.

of designating wholesale and retail distributors as the manufacturer's agents,[10] and whether illegally acquired stock could be used to acquire assets after proceedings had been started by the Federal Trade Commission.[11] What a striking contrast the law of a generation ago provides to the developments of recent years that I have traced in previous lectures and which I shall discuss with you tonight! Certainly no one will say of antitrust that the more things change the more they remain the same.

II

But for the dissent, the *Parke Davis*[12] decision would probably have gone unnoticed, since its holding that a "contract, combination or conspiracy" may be inferred from a course of conduct is hardly world-shaking or novel. The facts from which concerted action was inferred are generally no less compelling than the facts in a host of cases in which illegality has been found in the past.[13] According to the three dissenters, however, the Court has sent the *Colgate* doctrine to its "demise."[14] Justice Harlan finds *Colgate* "eviscerated" and thrown "into discard."[15] Justice Stewart in his concurrence sees the continuing validity of *Colgate* questioned by innuendo.[16] It is noteworthy that the majority does not purport to overrule *Colgate* and the Government expressly refrained from asking it to do so. Whether the forebodings of Justices Harlan, Frankfurter and Whittaker are well-founded, or whether they are indulging in the conventional hyperbole of dissenters, only time will tell.

The Second Circuit has already construed *Parke Davis* as having sapped *Colgate* of most of its vitality.[17] In *Warner* v. *Black & Decker,* although Judge Moore states that the *Colgate* principles "have not been completely destroyed,"[18] his ruling goes far beyond the *Parke Davis* decision itself.

The plaintiff in the *Warner* case was a distributor of Black & Decker, a company making portable electric power tools. Black & Decker directed plaintiff and its competing distributors to adhere to prices which it fixed. To enforce compliance with this direction, it threatened loss of distributorship, elimination of discounts, and the blacklisting of nonconforming distributors.

In 1958, plaintiff submitted the successful bid to the New York City Housing Authority. This bid was lower than the prices set by the defendant. Plaintiff was threatened with the cancellation of his distributorship unless he raised his bid. This he refused to do. Accordingly his franchise was terminated.

A treble damage action was thereupon brought on the theory that the manufacturer, the sole defendant, had violated the Sherman Act. That the complaint adequately averred an unlawful vertical price agreement between Black & Decker and its other distributors cannot be gainsaid. But the suing distributor, unlike his competitors, did not enter into the illegal agreement. It was precisely because of his refusal to do so that his franchise was cancelled. The injury which he sustained stemmed from an individual refusal to deal, not from the illegal contract.[19] To be sure, there were obscure and conclusory references in the complaint to a conspiracy and combination. But the trial judge specifically held that the complaint did not sufficiently charge that the manufacturer and the other distributors conspired to cut off the plaintiff[20]—a conclusion which the Court of Appeals accepted. The case thus holds actionable a naked refusal to deal by a single manufacturer in the absence of any combination or monopoly proximately causing injury to the private suitor.

It is apparent, therefore, that the confusion that has surrounded *Colgate* since its inception still endures and will be further compounded by the misinterpretation of the *Parke Davis* decision that has already taken place and which is likely to occur.

Most of the difficulty stems from the failure of the courts to recognize that there are three *Colgate* principles, not one. Consequently, when there is loose talk about demise and evisceration, it is vital to know precisely what it is that is being discarded.

Colgate, first and foremost, upholds the right of customer selection by a single trader. Secondly, it permits a manufacturer to suggest to its distributors and dealers the prices at which its products may be resold. The third phase of the case is a necessary limitation upon the other two principles. A manufacturer may not go beyond mere customer selection and the announcement

of its marketing policies and enter into contracts, combinations and conspiracies with its customers or with others to enforce such policies. In appraising *Parke Davis,* therefore, it is important that we treat each aspect of *Colgate* separately.

1. May a manufacturer lawfully refuse to deal with a price-cutter or with a customer who will not handle his products exclusively? Does it make any difference whether the refusal precedes any business dealings between the parties or entails a termination of a prior relationship? Is there any burden upon the seller to justify the reasons prompting his refusal to deal?

The single trader doctrine long antedates the *Colgate* decision. It is rooted in the common and statutory law of restraint of trade.[21] Cooley, in his first edition of Torts in 1880, phrased the principle in these terms: "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."[22] This formulation has the support of a vast body of state and federal court precedents.[23]

In *Lorain Journal,*[24] Mr. Justice Burton observed that the right of customer selection "is neither absolute nor exempt from regulation." This qualification, which has been much quoted in later cases,[25] has been construed, incorrectly I believe, as foreshadowing a retreat from *Colgate.* Immediately following this statement, Justice Burton goes on to say: "Its exercise as a powerful means of monopolizing interstate commerce is prohibited by the Sherman Act."[26] As authority for this exception, he quotes from *Colgate* itself, where the Court had said: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[27] All that Justice Burton meant when he said that the right was neither absolute nor exempt from regulation was that the refusal to deal could not be employed as a means of achieving or furthering a monopoly scheme. The Court specifically so held as far back

as 1927 in the *Eastman Kodak* case.[28] Certainly no one has ever construed *Eastman Kodak* as a "warning signal" or as an erosion of the single trader rule.[29] From its very inception *Colgate* was further qualified as not sheltering concerted or joint refusals to deal.[30] But these are the only qualifications upon an individual's right to refuse to deal.

The prevailing confusion calls for a return to first principles.

Sherman Act liability can only be predicated upon an infraction of either Section 1 or 2. Section 1, which forbids contracts, combinations and conspiracies in restraint of trade, is incapable of violation by a single actor. It takes two to make a contract or to enter into a combination or conspiracy. A refusal to deal, standing by itself, cannot constitute a contract, combination or conspiracy in restraint of trade. Section 2 deals with crimes which are capable of commission by a single actor. Hence, a refusal to deal by one having monopoly power may be challenged as an attempt to monopolize or a monopolization. Absent monopoly or a concert of action the very wording of the Sherman Law prevents it from being applied to outlaw the single trader rule. Plainly, if this aspect of *Colgate* is to be undermined, new legislation is required.

Nevertheless, the Seventh Circuit, in a decision handed down even before *Parke Davis* and *Black & Decker,* held unlawful a mere refusal to deal, when inspired by the illegal purpose of controlling resale prices—this in the absence of a combination or a purpose to monopolize.[31] The defendant in *Becken* v. *Gemex,* a manufacturer of watch bands, apprised its distributors, including the plaintiff, that it expected them to sell its products, as well as competing lines, at the prices suggested by the respective manufacturers of those lines. Defendant had talked to plaintiff's two principal competitors about defendant's philosophy of distribution and they "shook hands" over it. Plaintiff refused to join this price-fixing arrangement. Defendant accordingly carried out its threat to terminate the distributorship. The nub of the complaint was that the plaintiff was cut off because of his refusal to enter into an illegal agreement.

As in the *Black & Decker* case, there was no showing of any conspiracy between the manufacturer and the other distributors to terminate the plaintiff's franchise. The Seventh Circuit, quoting from *Lorain Journal* to the effect that the "right to stop dealing is neither absolute nor exempt from regulation," specifically holds that a manufacturer is limited "to a legitimate use of this weapon." The court indulges in this metaphorical reasoning: "A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose."[32] The Sixth Circuit, in an obscure opinion in a recent case, appears to take the same view.[33]

Black & Decker and *Gemex* run counter to established authority. Hitherto it has been universally held that a seller could refuse to deal with a buyer for any reason or for no reason, whether his purpose was lawful or unlawful, justifiable or not. On the precise facts of *Black & Decker* and *Gemex,* the courts have repeatedly rejected liability for the refusal by a seller to continue dealing with one who will not enter into an unlawful price agreement.[34] I find not even a radiation in the majority opinion in *Parke Davis* intimating the demise of the single trader doctrine. On the contrary, there is a specific reaffirmation of this right,[35] and as recently as last year, Justice Black in *Klors*[36] referred approvingly to this aspect of *Colgate.*

On the specific question as to whether liability may attach to a naked refusal to deal, my count shows that in the past decade alone *Colgate* has been directly applied or cited with approval in 26 opinions.[37] These are the precedents which some of the circuits appear to be discarding. If they are doing so as matter of policy, I must respectfully express my disagreement. The distinction drawn by the authorities between a refusal to deal by a nonmonopolist and a refusal by a monopolist rests upon the fact that there are alternative sources of supply or outlets in the one case and not in the other. Where there is monopoly, a duty to serve, akin to that prevailing in the public utility field, is imposed since

no viable alternative exists. Absent monopoly, freedom to choose those with whom one will deal is vital to the operations of our competitive system. Were the legitimacy of customer selection to rest upon motive or purpose, the right for all practical purposes would be non-existent since every termination of business relationships would be subject to the *ex post facto* and fluctuating judgments of courts and juries.

If these rulings of the lower courts rest upon their anticipation of what the Supreme Court may hold in the future, I think they are giving up the ghost prematurely. The Court is too mindful of the history of the single trader rule, the limitations imposed by the wording of the statute and the salutary policy underlying this *Colgate* principle to engage in what would be nothing short of judicial legislation at its very worst.

I think it is regrettable that the exaggerated language of the dissenters in *Parke Davis* may lead lower courts to believe that the Court intended to overthrow this vital phase of *Colgate*.

2. May a manufacturer suggest the resale prices he desires his customers to charge? And if his customers observe these suggested prices, have they entered into a contract, combination or conspiracy with the seller? Has this aspect of *Colgate* been obliterated?

The theory of *Colgate* is that a manufacturer, being privileged to refuse to deal with one who is unwilling to enter into an unlawful vertical price agreement or exclusive dealing arrangement, "not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others."[38] When dealers follow the manufacturer's suggestion, they are acting independently and of their own volition. They have given no assurance that they will continue to adhere to the manufacturer's prices. There is no promise, no bargain, no agreement. To be sure, as Justice Brennan shrewdly observes in *Parke Davis*, "the same economic effect as is accomplished by a prohibited combination to suppress price competition" will result if each customer, "although induced to

do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices."[39] But there is no violation of law since there is no contract, combination or conspiracy. Far from vitiating the privilege of announcing a policy of suggested resale prices, the Court in *Parke Davis* expressly upholds it,[40] and in so doing, follows a long line of cases to the same effect.[41] It is to be hoped that here also the fears of the minority may not lead lower courts to disregard the express affirmations of the opinion upholding the right of a manufacturer to suggest the prices at which his goods may be resold.

3. May the manufacturer go beyond the exercise of his right of customer selection and the announcement of suggested prices in an effort to bring about compliance by his customers with his marketing policies? The problem may be posed somewhat differently. At what point does the manufacturer cross the dividing line between individual and concerted action?

Naturally, this is a question which cannot be answered in the abstract. The rich diversity of facts in the relationship between a manufacturer and his distributors precludes the resolution of this factual issue by any facile formula or slide rule procedure. There are certain fact patterns which are instinct with concerted action. For example, a price cutter is dropped and then reinstated when the seller becomes satisfied that further price-cutting is unlikely to recur; or the manufacturer induces his wholesalers not to deal with recalcitrant retailers, obtaining their cooperation in the enforcement of his pricing policies, thus acting jointly and not individually.

Now, where does *Parke Davis* fit into this scheme of things? There, the defendant announced its policy of suggested prices. It refused to deal with price cutters. So far, so good. It enlisted the cooperation of its wholesalers who were induced not to deal with the offending retail price cutters. It reinstated a dealer upon his assurance that he would not advertise reduced prices, although he retained his freedom to sell below the manufacturer's suggested prices. Like agreements to refrain from advertising re-

duced prices were obtained from other retailers. To hold that these facts establish a combination hardly does violence to settled legal principles.

This area of the law from the beginning has been rich with confusion. A measure of further confusion has now been introduced by Justice Brennan, who seemingly differentiates between an agreement and combination.[42] He suggests that in a vertical price-fixing case there can be illegality in a set of facts where there is no agreement but merely a combination between a seller and buyer.

The cases heretofore have never given a different meaning to combination and conspiracy. I have had occasion to look into this matter many times and have never discerned any distinction between the two concepts.[43] The terms are synonymous. A "conspiracy," to use the words of Justice Douglas, "presupposes an agreement"[44]—a concert of action. And so does a combination. An agreement, in antitrust parlance, is not the same as an agreement in the law of private contracts. A conspiracy or combination—an agreement, if you will—is present where there is joint action. The Court's redefinition of "combination" is quite unfortunate, as it may lead the lower courts to find a combination in circumstances where there is really no concert of action and thus engender even greater uncertainty in our antitrust jurisprudence.

With this caveat, my conclusion is that the strictures of the minority in *Parke Davis* are unmerited and that the decision is within the main stream of antitrust rulings. To the extent that *Colgate* has been understood as providing a legal and practical method of vertical price control by organized means and devices, there indubitably has been a demise. But the death occurred as long ago as 1922, when the *Beech-Nut* case was decided. Systematic or organized implementation or enforcement of a policy of suggested prices converts suggestion into coercion, cooperation into combination, or, at the very least, creates a triable issue of fact as to whether such coercion or cooperation has occurred. The fact that *Colgate* is not to be tolerated as a shield for retail price

maintenance by methods involving joint action, whether voluntary or coerced, does not mean that the other and more significant aspects of *Colgate* are to go down the drain. It is to be hoped that the Second, Sixth and Seventh Circuits will bring their decisions into conformity with the overwhelming body of federal case law.

III

The implications of the recent decision of the Sixth Circuit in the *Tampa Electric* case[45] are, to my mind, much more disturbing than the supposed radiations of *Parke Davis*. *Tampa Electric* suggests that Section 3 of the Clayton Act not only outlaws those requirement contracts which infringe the test of *Standard Stations*,[46] but that it forbids arrangements which do not involve the feature of exclusivity at all.[47] Carried to its logical conclusion, the rationale of the majority puts in jeopardy any large scale contract foreclosing competitors from business which another seller has garnered.

The *Tampa* case was this: Tampa, an electric utility, was constructing a third integrated generating plant, thus adding two units to the eleven that it already had in operation. The eleven units in the other two plants used oil. The two units to be constructed were to use coal rather than oil. Tampa agreed to buy all of the requirements of the new units for a period of twenty years from the seller, a Kentucky coal company. It retained its freedom to buy coal from anyone else in the event it converted its existing oil equipment to coal. If it added four more coal burning units in the new plant, it agreed to buy the coal these units required for a period of ten years from this seller, but it was free to install oil rather than coal-burning units. The majority does not take into account a fact that is disclosed by the dissent—that even with respect to the two units, the buyer could purchase up to 15% of its needs from the by-product of a local supplier.

We thus have here an agreement which does not impose any obligation on a buyer to refrain from dealing in the goods of a competitor. It is not even an agreement which is coextensive with all of the buyer's plants. The obligation was limited to the two

new units that were being constructed, and possibly four more.

The suit arose in a rather peculiar way. After Tampa had expended $3 million more to install coal-burning equipment than if oil had been used, and the seller spent $7.5 million to enable it to supply Tampa with coal, the seller advised the buyer that it would not honor the agreement. In the buyer's suit for a declaratory judgment to adjudicate the validity of the contract, both the District Court and a divided Court of Appeals found a violation of Section 3 and exonerated the seller of any obligation under the sales contract.

I put to one side whether this case is consistent with *Kelly* v. *Kosuga*,[48] which I discussed last year,[49] dealing with an unsuccessful effort to defeat a seller's recovery for goods sold and delivered by reason of the alleged illegality of the agreement. I also put to one side whether the market was properly delineated as coal, as contrasted with all fuels used in generating electricity. What fascinates me is how a contract can be said to offend against Section 3 when there is no agreement or condition on the buyer's part not to deal in the goods of others. By its very terms, the statute deals only with obligations and conditions imposed upon the buyer himself—"condition, agreement or understanding that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller."[50] This distinction underlies the decision of the Supreme Court in the *Gasoline Pump* case.[51] There gasoline dealers agreed to use only the lessor's brand of gasoline in pumps which they rented on nominal terms. The Court pointed out that they were free to obtain pumps from others and to buy other brands of gasoline. Accordingly, the Court was unable to find any agreement or condition of exclusivity.[52]

How can *Tampa* be squared with the *Pump* case? The majority in the Sixth Circuit recognizes that *Standard Stations* declared that a seller may lawfully require a buyer to purchase fixed quantities of gas approximating his possible requirements without running afoul of the statute.[53] Nevertheless, the Court of Appeals was unimpressed by the fact that the buyer here was free to pur-

chase coal from other sources in the event it converted its oil units into coal. It felt that such conversion was unlikely, asserting that it must deal with the realities of the situation. But how likely is it that the buyer will patronize others when he is committed to the large quantity purchases adverted to by Mr. Justice Frankfurter? The issue is not likelihood, but contractual obligation.

Moreover, if it is of no materiality that the buyer is free to go elsewhere for 15% of his requirements, what is the consequence if he commits himself to purchase 75% or 50%, or even 25% of his needs from the seller? Whatever he buys from one, he is unable to take from another. If the test is foreclosure alone, then competitors are being foreclosed every time a contract of purchase is made, no matter how minuscule it may be. If the buyer agrees to purchase all the coal requirements of one furnace from Seller A, he cannot buy the coal for that furnace from Seller B. The same consequence ensues when he purchases a fixed amount of coal from one seller—to the extent of the prior purchase, he is out of the market for more coal. Is complete fluidity demanded in all business relations to the end that competing buyers have a chance to bid for every shipment? Are we on the threshold of a share-the-business policy? I had thought that in the case of exclusives, the evil to which Section 3 was addressed was total exclusivity explicitly imposed by condition, agreement or understanding.

The notion that Section 3 forbids substantial as well as total exclusivity is particularly intolerable when coupled with *Standard Stations'* concept of quantitative substantiality—as, indeed, it was coupled in *Tampa Electric*. It is bad enough to outlaw true exclusive dealing agreements by conclusively presuming the requisite statutory effects merely because the arrangements embrace a substantial share of the market.[54] But it is far worse when the same mechanical formula is applied in cases where there is no exclusive in the first place. If a buyer accounting for 10% of the market agrees to purchase 50% of his supplies from the seller, this partial requirements contract "forecloses" com-

petitors from a substantial segment of the market in the *Standard Stations* sense, namely, 5%. The same percentage is derived in the case of a 50% factor with a 10% requirements contract. There is no end to the tricks that can be played by juggling percentages in this context. And every time a substantial purchase is made, there is a like foreclosure.

Tampa's novel construction of Section 3 imperils many normal and usual business arrangements unless its thrust is confined to matters of form rather than substance. If foreclosure, willy-nilly, is the index of statutory infraction, then competition itself is imperilled, since the successful conclusion of competitive activity—the award of a contract—spells illegality. If the test is partial as distinguished from total exclusivity, where is the line to be drawn? If the statute is to be rewritten and the reach of Section 3 extended, is not Congress better equipped than the courts to grapple with these far-reaching questions of policy?

IV

In recent years I have called attention to the fact that the Department of Justice has brought a number of suits challenging so-called territorial security clauses in dealer franchise agreements and has succeeded in obtaining consent decrees in which the defendants have agreed to refrain from imposing such restrictions upon their customers.[55] I have pointed out that the Department's position and the decrees which have been entered are contrary to settled authority.[56] No one, however, had seen fit to challenge the Department and the number of consent judgments has mounted.[57]

This past year, one defendant, Volkswagen, did contest rather than yield. It made a motion to dismiss that part of the complaint which declared unlawful the territorial restrictions in the Volkswagen distributor and dealer franchise agreements.[58] The case came before Judge Forman. One might have anticipated that the Department, having for years asserted that these arrangements are unlawful, would have gone before the court and said: "Your Honor, to be sure the cases cited by the defendant have sustained

such arrangements, but they all stem from an earlier vintage and are the product of a different antitrust climate. We think that the Sherman Act demands that they now be invalidated, and we ask you to deny this motion by the defendants."

What did the Government do? It came in and said, in effect: "Judge, you don't have to pass upon this question. It is really not before you because the restrictions in this case are intertwined with illegal price restraints. You are confronted with one entire unlawful scheme. It makes no difference whether these restrictions, standing alone, are lawful or unlawful, since it is settled that the lawful may be prohibited together with the unlawful, when part and parcel of one illicit scheme."[59]

And that is what Judge Forman held. He said that it was not necessary for him to pass upon the independent validity of territorial restrictions, since the restraints were allegedly connected with illegal vertical price controls by the manufacturer.[60]

Now, what are we to make of the Government's position in this case? I think there are two possible interpretations. One is that it recognizes what is established law, namely, that territorial restrictions are only illegal when they are an integral part of an unlawful Sherman Act scheme, such as price-fixing. The other is that the Government is reluctant to have its views tested concerning the alleged illegitimacy of these restraints and prefers to defer further determination until it has amassed a larger number of consent decrees.

V

Each year since 1954 I have reported to you on the annual developments in the merger field.[61] First came the epochal construction of the new legislation by the Federal Trade Commission in *Pillsbury*.[62] Then, as complaints were filed in the courts, I explored their implications with you.[63] There followed the interesting debates on quantitative substantiality.[64] *Cellophane*[65] and *du Pont-General Motors*[66] brought the market issue to the fore. Two years ago I was afforded a scoop by the announcement of the far-reaching *Brillo* decision[67] on the eve of my lecture.

Last year I reviewed a spate of cases by the courts, the Commission and its hearing examiners.[68] An unending stream of rulings has continued during the past year. The unfolding of the story in installments has been reminiscent of the serial movies of yore, such as "The Perils of Pauline." The law has zigged and zagged. The high hopes reached by the developments in one year have been dashed in another year, only to be revived thereafter.

With *Brown Shoe*[69] before the Supreme Court, *Crown Zellerbach*,[70] *Spalding*[71] and *Reynolds Metals*[72] before the Courts of Appeals, and with a host of litigations reaching the decisional stage in the trial courts, we are on the threshold of authoritative determinations on the scope and meaning of the antimerger statute.

Let me report briefly what has happened this past year. First, I should like to bring you up to date on the box score which I have presented to you annually. A total of 64 cases have been instituted by both the Department of Justice and the Federal Trade Commission under amended Section 7, or more than twice the number of merger cases brought under the Sherman Act in the sixty-year period between 1890 and 1950, when the Celler-Kefauver Act went into effect. The honors are divided almost equally between the Commission and the Department of Justice: 34 proceedings for the Commission and 30 suits for the Department.[73] Thirteen of these litigations have been terminated by consent.[74] Since my last lecture, the Antitrust Division has started 11 new cases,[75] and the Commission five.[76]

The most notable developments of the past year have been the affirmance by the Supreme Court of Judge Holtzoff's decision in the *Maryland & Virginia Milk* case;[77] Judge Weber's determination in *Brown Shoe*,[78] striking down Brown's acquisition of Kinney; Judge LaBuy's ruling on relief in *du Pont-General Motors*;[79] and the consent judgment in *Anheuser-Busch*.[80] In the Commission, the initial decisions in favor of respondents in *Brillo*[81] and *Spalding*[82] have now been reversed; final orders of divestiture have been issued in *Erie Sand & Gravel*,[83] and *Reynolds Metals*;[84] and the famous *Pillsbury* case[85] awaits decision.

Every adjudication, both in the courts and by the Commission thus far, has been against the merger. The lone exception is *Scott Paper,*[86] which is now pending on appeal from a second ruling of the hearing examiner upholding Scott's acquisitions.[87]

The complexity of the facts in the various merger cases and a decent regard for your patience counsels against any lengthy review of these rulings. I cannot, however, pass up the story of *Brown Shoe,*[88] which is now before the Supreme Court.

There are more than 800 shoe manufacturers in this country. Brown, the acquiring company, was the fourth largest shoe producer, with a market share of less than 4%. Kinney, the acquired company, ranked twelfth, accounting for approximately 0.5%. Each company manufactured a variety of types and styles of shoes, Kinney's selling in the low to medium price field and Brown's in the low to medium-high brackets.

In 1951, Brown began to acquire retail outlets in various parts of the country. These company-owned stores supplemented independent shops which handled the Brown line exclusively. The District Court does not differentiate between the stores which Brown owns and those which merely handle its goods. The two are lumped together in an omnibus statistic of 845 establishments. Neither Brown's share of shoes sold nationally at the retail level, nor in the various sections of the country which the court adopts in its geographical definition of the market, is disclosed.

The challenged acquisition with Kinney occurred in 1956. As already indicated, Kinney was a small factor in the manufacture of shoes. It operated a chain of some 360 stores. From a national point of view, its share of the retail market was 1.2%. Again, Kinney's share in the various sections of the country is not indicated. But Kinney's retail system is described as the largest "family" shoe store chain in the nation.[89] Brown, after the merger, is characterized as the dominant shoe firm in the country, when considered from both the manufacturing and retail outlet standpoint.[90]

The first task before the court was to delineate the relevant

market, both product-wise and geographically. The Government contended for all shoes or, alternately, for men's, women's and children's shoes. The defendants, stressing differences in quality, grade, price and use, asked for a fragmentation of the product market into narrower groupings. In the men's field, for example, it wanted the court to differentiate between men's dress shoes, men's casual shoes, men's work shoes, and the like. Judge Weber adopted men's, women's and children's shoes as the three lines of commerce, rejecting the other contentions of the Government and the defendant.

Sectionally, the court divided the country into 141 retail markets. It took as the dividing line communities with a population of 10,000 or more in which both Brown and Kinney have retail shops.

Having thus defined the market, the judge inexplicably ignores it when he turns to a discussion of competitive effects. The court makes no effort to show the likelihood of an adverse impact on competition in any of the three lines of commerce—men's, women's and children's shoes—in any of the 141 sections of the country. What it does is accept the most extreme arguments that the Government has advanced in any antimerger case.

The Government takes as its Bible one paragraph from the report of the House Judiciary Committee.[91] That represents legislative history. Everything else is ignored. Not only does this paragraph reflect Congressional intent, according to Government counsel, it also constitutes the law. Whatever the statute may say, its interpretation is governed by this single legislative passage.

"The Bill," said the House Judiciary Committee, "is intended to permit an intervention when the effect of an acquisition *may be*"—and these are the important words which are ignored by the Government and by Judge Weber—*"a significant reduction in the vigor of competition,* even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[92] The House Report continues: "Such an effect [*i.e.,* a significant

reduction in the vigor of competition] may arise in various ways, such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition; increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive; undue reduction in the number of competing enterprises; or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." [93]

The Committee merely provided several illustrations of situations in which a significant reduction in the vigor of competition might occur. It did not say that this result inevitably would follow. This telling fact is completely disregarded. If the elimination in whole or in part of the competitive activity of a substantial factor in competition were *per se* unlawful in every case, we would be back to the language of original Section 7, which condemned acquisitions where their effect might be to substantially lessen competition *between* the acquiring and acquired companies.[94] In 1950, however, Congress specifically rejected this test as unduly restrictive and omitted it from the revised legislation.[95]

Enlargement of a company to a point where it threatens to have a decisive advantage over its competitors is merely another way of saying—if the word "decisive" is given its normal meaning—that the acquiring concern has approached monopoly proportions. That, however, is not the way the Government reads the Report. It views any economic advantage as decisive. And that, of course, is tantamount to contending that all mergers are unlawful, since no acquisition is likely to be made unless an economic advantage is envisaged.

The Government likewise treats any reduction in the number of competing enterprises as a trend towards concentration, completely ignoring the significant adjective "undue." Undue means unreasonable or excessive. It is not synonymous with "any."

The last of the Committee's illustrations relates to vertical acquisitions, where reasonable access to supplies and outlets is

denied, thus depriving competitors of a fair opportunity to compete. Here again it is not so much the language of the Report as the Government's watered-down interpretation which causes the difficulty. Any vertical integration is deemed unfair to non-integrated competitors.

Judge Weber sees in Brown's acquisition of Kinney a tendency towards concentration, the elimination of a substantial factor in competition, and the deprivation of small shoe manufacturers and small retailers of a fair opportunity to compete. While the emphasis in the opinion is upon the effects at the retail level, there is an adjudication that the fusion of a 4% with a 0.5% factor in manufacturing shoes, against the context of the vertical aspects of the combination, is itself illicit.

Even more unsound than the Court's uncritical reliance upon the House Report is its emphasis upon Brown's prior acquisitions. The significance of other mergers looms up as a key issue in many of the pending Section 7 cases. The Government takes the position that when it shows a background of other acquisitions, even though it does not question their legality, this showing is probative of the illegality of the specific transition under attack. It relies for this proposition upon the wording of the House and the Senate Reports, and Judge Weber did likewise. Such reliance, I submit, proceeds from a misreading of the legislative materials. This, however, is not the occasion for me to analyze Committee reports with you. At this time I should like to remind you that the statute itself is couched in language which makes it abundantly clear that the forbidden effects must result from the challenged acquisition and not from any others.

Furthermore, Judge Weber does not come to grips with the decision of the Supreme Court in *International Shoe*,[96] which arose under the Act prior to its amendment. *International Shoe* involved a merger of the largest and fourth ranking shoe manufacturing companies. The Court held that this did not violate the more exacting standards of original Section 7. In so holding, it endeavored to articulate the basic policy underlying Section 7 in its 1914 version. The Court's words were given top billing in

the House Report. They are worth reading, together with the House Committee's comment.

The Court said: "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . ; that is to say, to such a degree as will injuriously affect the public." [97]

The Committee's pregnant observation was this: "The language in the amendment it will be noted follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe case." [98]

It is also noteworthy that the quotation from *International Shoe* was read on the floor of Congress.[99] And the House Committee further pointed out: "the language in [the bill] is considerably less restrictive than the language in the present section 7"—the statute under which *International Shoe* was decided.[100] By the same token, the Senate Report stated: "The present wording of [the bill] is intended to cover more than is prohibited by the Sherman Act and yet to stop short of the stated test of the present section 7 of the Clayton Act." [101]

To say, as Judge Weber does, that the Congress which was told that the new statute would forbid acquisitions lessening competition to such a degree as would injuriously affect the public, intended to prohibit "minute acquisitions," [102] plainly does violence to the legislative record when read as a whole.

Brown Shoe thus bristles with thorny questions of law. Has the court applied the correct legal principles in its delineation of the product and geographic markets? Has it employed the correct substantive standard of legality? Has it read the legislative record correctly? Has it given adequate effect to the Supreme Court's prior decision in *International Shoe*?

In view of the fact that 64 cases have been brought by the Government under the new statute, that a decade has passed without any determination by the Supreme Court, that the Bar, enforcement officials and business community are genuinely per-

plexed concerning the meaning of the statute as applied to concrete situations, that the lower courts and the Commission are patently in need of guidance, and that there is the sharpest disagreement concerning the effect of the new legislation, one would have thought that the Government would have welcomed the opportunity to obtain an expression of the Supreme Court's views on the issues which *Brown Shoe* presents. Instead, it has made a motion to affirm on the ground that *Brown Shoe* involves questions of fact alone, and focuses "on no significant legal issue."[103] The Supreme Court is cavalierly informed that the District Judge applied the correct legal principles. Typical of these principles, presumably, is one which the Government asserts controls the court's disposition of the vertical aspects of the case.

It will be remembered that Brown concentrated on manufacture to a greater extent than Kinney. Kinney was unable before the acquisition to supply its retail shops from its own factories. It was a customer of other manufacturers. After the merger, the Kinney stores obtained $1.5 million worth of shoes from Brown. This represented approximately 8% of Kinney's purchases. All of Kinney's sales aggregated about 1.2% of total retail shoe store sales in the United States. The $1.5 million of Kinney purchases from Brown, therefore, represented less than one-tenth of one percent of total national shoe consumption. Here is the legal significance attributed to these facts by the Government in its motion to affirm: "Thus the court below was fully warranted in concluding that Brown's share of the Kinney market would grow well beyond its present substantial amount. Of course, the acquisition violates Section 7 if it excludes competitors from a significant portion of a substantial market that they would otherwise have had. . . . Such a significant exclusion is shown by this record."[104]

I ask whether this is or is not quantitative substantiality with a vengeance. I had hardly thought, in view of the unanimous condemnation of quantitative substantiality by the official spokesmen of the Government[105] and the course of decision since

the amendment of the statute,[106] that this unsound principle would be urged by the United States before the Supreme Court. The then head of the Antitrust Division was the principal architect of the chapter in the Attorney General's Committee Report on mergers, assisted as he was by the present head of the Division. The Report contains this unqualified statement: "In no merger case, horizontal, vertical, or conglomerate, can a quantitative substantiality rule substitute for the market tests Section 7 prescribes."[107] The effort of the Department to foreclose any real review of the important questions which *Brown Shoe* presents is the most disturbing development I have encountered since these annual lectures were inaugurated.[108]

While even lawyers tend at times to speak loosely of test cases, there can be no test case of the legality of mergers save in a most limited way when, as even Judge Weber has conceded, the lawfulness of each merger must depend upon its special facts.[109] Each of the many pending merger litigations has its special facts meriting separate consideration and decision.

Two years ago I ventured to predict that the Government would pursue the same absolute approach concerning the matter of relief as it had with respect to the substantive statutory standard; in short, that it would invariably demand divestiture in every Section 7 case.[110] Events have borne me out. On remand before Judge LaBuy in *du Pont-General Motors,* the Department took the unequivocal position that divestiture is mandatory and that there is never any room for lesser measures.[111] It is now urging the same point on appeal to the Supreme Court.[112]

In seeking an order compelling du Pont to divest itself of its 63 million shares of General Motors stock, the Department is arguing that since the Clayton Act requires divestiture when the antimerger proceeding is instituted by the Federal Trade Commission, it is reasonable to suppose that Congress intended the same remedy to be accorded when an acquisition is successfully attacked in court. Judge LaBuy did not stop to consider the validity of the basic premise underlying this argument, that is, whether divestiture is indeed automatically required upon a

finding of infraction by the Commission—a premise which I seriously questioned the last time I addressed you on this subject.[113] The judge, not having that issue before him, simply held that whatever the rule might be in a case before the Commission, a court of equity had broad authority to mold its decree to fit the exigencies of the situation without causing unnecessary hardship—in a Clayton Act proceeding just as well as in a Sherman Act case.[114] While it unquestionably had the power to direct divestiture, it refused to exercise it because of the alternative of other effective relief which, unlike divestiture, would avoid severe tax consequences to innocent stockholders and impairment of the value of their investment. By stripping du Pont of voting rights on its General Motors stock and passing them on pro rata to its shareholders, and coupling this with a series of injunctive provisions designed to prevent du Pont from exercising any influence over the conduct of General Motors' business, Judge LaBuy concluded that he was carrying out the Supreme Court's mandate "to eliminate the effects of the acquisition offensive to the statute."[115]

Now that the Supreme Court has affirmed Judge Holtzoff's grant of relief in the *Maryland & Virginia Milk* case,[116] we have a pretty good clue that the Government will not prevail in its fundamental thesis that the courts must as a matter of law order divestiture to undo the effects of a Section 7 violation. To be sure, Judge Holtzoff required the defendant to divest itself of the illegally acquired properties; where the Government failed was in its effort to make the agricultural cooperative also disgorge certain other assets which were obtained and used in the business of the acquired dairy after the acquisition.[117] The significant thing about the decision, insofar as it has radiations bearing on *du Pont-General Motors,* is that the Court, in rejecting the Government's demand for further relief, pointedly observed that "the formulation of decrees is largely left to the discretion of the trial court."[118]

If Judge LaBuy's ruling is also ultimately sustained, one might well confront the Government with its own argument after turn-

ing it around: How could Congress conceivably have intended divestiture as the only permissible remedy in a Section 7 proceeding by the Commission when there was no such intention where enforcement is sought in court?

Ironically enough, the same concept of broad equitable powers which led Judge LaBuy to reject divestiture as a necessary remedy prompted him to reach out and grant relief against a party who had not violated any law. General Motors, of course, was a proper party defendant initially in view of the Sherman Act count in the case. The District Court, however, had dismissed the complaint in its entirety, and the Supreme Court merely reinstated that part asserting a violation by du Pont of the Clayton Act. There was no claim that General Motors had likewise violated Section 7, since the statute is plainly directed against buyers and not sellers. Accordingly, when the hearings were held on remand, General Motors maintained that the court was powerless to grant any relief against it because it had done nothing unlawful. Judge LaBuy agreed that General Motors had violated no law, but held that "the historical powers of a court of equity" were sufficiently elastic to issue a decree against the acquired company if necessary to insure elimination of the offensive effects of the acquisition.[119] The fact that the defendant was not a law violator was deemed relevant only in determining the nature of the relief granted against it. The judge then proceeded to enjoin General Motors from having common officers, directors or employees with du Pont; continuing any existing preferential trade arrangements between the two companies; and entering into any such arrangements or joint commercial ventures in the future so long as du Pont owns General Motors stock.

Unlike General Motors, the selling defendants who were saddled with an injunction in the *Anheuser-Busch* consent judgment[120] were at no time charged with any violation of law. While consent decrees are not precedents, the District Court had previously denied the sellers' motion to dismiss without opinion[121] (at a time prior to Judge LaBuy's decision in *du Pont-General Motors*). The complaint questioned the legality of Anheuser-

Busch's purchase of a Miami brewery, and in opposing the sellers' motion, the Government argued that to restore competition in the Florida brewing industry, it might be necessary to require the sellers to take back their brewery.[122] The consent decree, however, contains no such requirement. Anheuser-Busch is ordered to sell the acquired property to any purchaser of its choice approved by the court. But, in addition, the selling defendants are enjoined from selling their other breweries, located outside Florida, without giving the Antitrust Division sixty days' advance notice of the proposed sale. This relief against the sellers manifestly bears no relationship to restoring the *status quo ante*—the basis on which the Government urged their retention in the case.

Largely on the strength of Judge LaBuy's reasoning, a District Court in Wisconsin has also endorsed the notion that a seller may properly be joined in a Section 7 case to insure effective relief.[123] Pabst Brewing Company bought the business of Blatz, another brewer, from a Schenley subsidiary in exchange for cash, debentures, stock and a stock purchase warrant. A complaint was filed against Schenley and its subsidiary as well as Pabst. On the sellers' motion for summary judgment, the Government conceded that they had not violated the statute but argued that they should be kept in the case so that Schenley might eventually be required to refund the purchase price to Pabst in return for Blatz. "How else," the Government attorney inquired, "are you going to restore competition?"[124] While not suggesting that such extraordinary relief would ever be granted, Judge Tehan denied the motion, stating that "some" relief might be decreed against the selling defendants if the acquisition were held unlawful. An interesting postscript is that the Government subsequently moved to restrain Schenley from disposing of its Pabst stock or purchase warrant pending final determination of the merits of the case.[125] The motion is still pending.

I need not dwell on the obvious important implications of these decisions. Personally, I have the greatest difficulty understanding how a court—even a court of equity—can assert juris-

diction against a party who has neither violated nor threatens to violate any law and who has breached no legal duty. The statute is clear on its face. And for once nobody disputes its clarity. No one has suggested that a seller can run afoul of Section 7. Nor is there anything in the legislative reports indicating a purpose to reach sellers. It is indeed a novel doctrine—certainly not a historical one—that sanctions the use of judicial process to embroil law-abiding parties in legal controversy. To me this trend is symptomatic of the extreme stands that are currently being taken in antitrust enforcement—stands for which I can find no warrant in history, precedent or policy.

VI

Three years ago, I had occasion to explore with you the factors which a judge should consider in deciding whether to accept a plea of *nolo contendere* in an antitrust case.[126] At that time I took issue with the position of some federal judges that such a plea should be refused, simply on the ground that it deprives private plaintiffs of the benefits of Section 5 of the Clayton Act.[127] Since then, the courts have continued to exercise their discretion in accepting or rejecting such pleas.[128]

In a case that has received much publicity, *United States* v. *McDonough Co.*,[129] Judge Underwood of the Southern District of Ohio permitted a plea of *nolo* but thereupon imposed jail sentences, without any advance notice to the defendants that such drastic punishment was in contemplation. *McDonough* was a price-fixing case in which five corporations and four corporate officers were joined as defendants. The defendants originally pleaded not guilty, but then endeavored to withdraw their pleas and substitute *nolo contendere*. Judge Underwood accepted this offer, albeit somewhat reluctantly, upon the Government's statement that it deemed such action appropriate. He then turned to the matter of sentence. The only penalties which the Justice Department recommended were fines, ranging from $5,000 in the case of the individual defendants, to $15,000 and $20,000 in the case of the corporations. However, as to the individual de-

fendants, the court imposed not only the recommended fines, but ninety days' prison sentences as well.

One of the defense counsel protested that in advising his client to plead *nolo,* he had examined every antitrust case involving such a plea and had found no instance in which a defendant had been sentenced to jail. This protest was rejected by the court on the ground that a *nolo* is legally equivalent to a guilty plea, except that it does not constitute prima facie evidence in a private suit under Section 5 of the Clayton Act.

The judge was aware that the defendants' plea had saved the Government the expense of trying the case as well as the court's time. However, he said a fine would not sufficiently deter others, or, indeed, the very defendants before him, from violating the Sherman Law in the future. Since the judgment could not be used under Section 5, and since the penalties imposed were less than the maximum, defendants had benefited from their pleas.

No one will dispute that price-fixing is a serious offense, or that imprisonment, which the court has the power to impose, is a greater deterrent than a fine.[130] The difficulty with Judge Underwood's reasoning is his failure to take into account that prison sentences will not only deter price-fixing, but the settlement of antitrust litigation as well. The court apparently feels that the plea of *nolo contendere* exists only for the benefit of defendants. But, in fact, the plea also benefits the Government, and, in consequence, the efficient administration of the antitrust laws.

The idea of the *nolo* plea is to provide an instrument by which criminal cases can be expeditiously settled, without a binding admission of the facts. It is a plea which has its roots in the common law,[131] has always been utilized in the federal courts,[132] is specifically provided for by the criminal rules, [133] and has been approved by Congress.[134] Judge Underwood himself characterized the Justice Department's acquiescence in *McDonough* as a decision that the public interest would be better served by accepting the pleas than by rejecting them.[135]

Some of the reasons why the Department thought acceptance

was in the public interest can be found in the statistics published in its last three Annual Reports, those for the fiscal years 1956, 1957 and 1958.[136] The statistics for fiscal 1959 are not yet available. In these three years the Antitrust Division closed a total of 70 criminal actions. Forty-six of these actions were terminated by a plea of *nolo contendere,* or, in some instances, by a plea of guilty. Of the 24 cases that were not so terminated, the Government won only five. Eight others were *nolle prossed;* one was dismissed by the District Court; and ten were lost after a full trial.

This past year itself witnessed two dramatic dismissals of criminal prosecutions which are not mirrored in these statistics: the *Tulsa* case,[137] thrown out by Judge Savage, and the *Salk Vaccine* case,[138] by Judge Forman.

The Justice Department's own statistics, therefore, make it apparent that the *nolo* plea forms an essential cog in the Antitrust Division's enforcement machinery. It is equally apparent that if many courts follow the lead of Judge Underwood, this cog will be removed, and the machinery may very well break down.

A parallel development seems to be taking place in the sphere of consent decrees. There has recently been made public a statement by the Acting Assistant Attorney General that he is considering requiring admission of liability and an adjudication of illegality to be inserted in consent decrees, where a State or its subdivision has borne the prime brunt of the alleged violation and has filed a private action or has indicated its intent to file one promptly.[139] He distinguished this type of case from one in which a private party might be aggrieved on three grounds: the difference in the number of people affected, the probable lack of the attorney's fee incentive, and considerations of comity.[140] All this is modest enough and possibly unexceptional, if not carried any further. If, however, the Government intends to extend this policy, it might take into account that the consent decree is even more vital to the disposition of civil cases than the *nolo* plea is to criminal cases.

Again referring to the Department's own statistics, for the fiscal years 1956, 1957 and 1958, the Antitrust Division closed 99

cases, 74 of which were terminated by consent decrees. Of the 25 that were not, the Government won only ten. Three others were dismissed upon application of the Government, three were dismissed by the District Court, and nine were lost after trial.

Consolidating civil and criminal cases, the Government concluded 120 cases out of a total of 169 by pleas of *nolo,* consent decrees or pleas of guilt. And of the remaining 49 not terminated by consent, only 15 were won by the Government.

Turning to the current dockets, the Justice Department had 103 cases pending in the courts at the end of fiscal 1958.[141] In the calendar year 1959, it instituted 63 new cases, 14 more than the total number it disposed of in the three fiscal years by means other than settlement.[142] If the Government attempted to take each of these cases to trial, it is evident that the resulting congestion and calendar delay would seriously endanger the efficient functioning of the courts and might result in a total collapse of antitrust enforcement.

In light of these statistics, one may well ask whether rulings and policies discouraging the use of traditional methods of settling litigation on a reasonable, fair and realistic basis really advance the cause of antitrust or promote the public interest.

NOTES

1 See TAFT, PRESENT DAY PROBLEMS 132, 177, 236 (1908); Address, Cincinnati, Ohio, July 28, 1908 (Acceptance of Republican Nomination); Address, Hot Springs, Virginia, August 21, 1908; Address, Washington, D. C., March 1909 (Inaugural); Address, Des Moines, Iowa, September 20, 1909; Address, Portland, Oregon, October 2, 1909; Address, Washington, D. C., December 7, 1909 (First Annual Message); Address, Washington, D. C., January 7, 1910 (Special Message to Congress on Interstate Commerce and Antitrust Laws and Federal Incorporation); Address, New York, New York, February 12, 1910; Address, Washington, D. C., December 6, 1910 (Second Annual Message); Address, Washington, D. C., December 5, 1911 (Third Annual Message, Part I—The Antitrust Statute); Address, Washington, D. C., August 1, 1912 (Acceptance of Republican Nomination); TAFT, THE ANTITRUST ACT AND THE SUPREME COURT (1914); TAFT, JUSTICE AND FREEDOM FOR INDUSTRY (1915). ROOSEVELT, CAMPAIGNS AND CONTROVERSIES, 15 WORKS OF THEODORE ROOSEVELT

40 (National ed. 1926); Address, Grand Rapids, Michigan, September 7, 1900, *id.* at 348; Letter, September 15, 1900, *id.* at 363 (Acceptance of Vice-presidential Nomination); First Annual Message, 9 RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 6644 (1912); Address, Providence, Rhode Island, August 23, 1902; Address, Boston, Massachusetts, August 25, 1902; Address, Cincinnati, Ohio, September 20, 1902; Address, Washington, D. C., December 2, 1902 (Second Annual Message).

2 In 1959, the Justice Department instituted 63 antitrust cases—a 50% increase over the average for the first five years of the decade. Department of Justice Release, January 4, 1960. The number of antimonopoly cases instituted by the Federal Trade Commission has shown an even more remarkable increase. In the first five fiscal years of the decade the Commission instituted an average of 30 such cases a year. In its last two fiscal years, however, the Commission has instituted 86 and 79 suits, respectively, marking an increase of almost 200%. FEDERAL TRADE COMMISSION ANNUAL REPORTS, 1950–1959.

3 See, *e.g.*, Dyer's Case, Y.B., 2 Hen. V, V.5, pl. 26 (1415). See generally HANDLER, CASES ON TRADE REGULATION 104–08 (3d ed. 1960), and cases cited therein.

4 United States v. International Harvester Co., 274 U.S. 693 (1927).

5 United States v. General Electric Co., 272 U.S. 476 (1926).

6 Federal Trade Commission v. Western Meat Co., 272 U.S. 554 (1926).

7 United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

8 *Ibid.*

9 United States v. International Harvester Co., 274 U.S. 693 (1927).

10 United States v. General Electric Co., 272 U.S. 476 (1926).

11 Federal Trade Commission v. Western Meat Co., 272 U.S. 554 (1926).

12 United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

13 See, *e.g.*, Victor Talking Machine Co. v. Kemeny, 271 Fed. 810 (3d Cir. 1921); Straus v. Victor Talking Machine Co., 297 Fed. 791 (2d Cir. 1924); *cf.* United States v. Masonite Corp., 316 U.S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

14 362 U.S. at 49.

15 *Ibid.*

16 *Ibid.*

17 George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960).

18 "The Supreme Court," Judge Moore said, "has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise" (*Id.* at 790).

19 See Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (9th Cir. 1954), *cert. denied*, 348 U.S. 875 (1954); Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

20 172 F.Supp. 221, 225 (E.D.N.Y. 1959). The fact that the defendant and others violated the antitrust laws is an irrelevance, so far as the plaintiff is concerned, where, as here, the violation is not the proximate cause of harm to the plaintiff. See, *e.g.*, E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc., 252 F.2d 473, 479 (9th Cir. 1958), *cert. denied*, 356 U. S. 951 (1958); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 915 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); American Can Co. v. Russellville Canning Co., 191 F.2d 38, 54 (8th Cir. 1951); Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49, 51 (7th Cir. 1949), *cert. denied*, 338 U.S. 830 (1949). The cause of plaintiff's injury was the individual

refusal to deal, not the illegal vertical price agreement. The private suitor sues, not as a self-appointed prosecutor or vicarious avenger of a public wrong, but rather to redress the injury which he himself has suffered.

21 Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915); Slichter, *The Cream of Wheat Case*, 31 POL. SCI. Q. 392, 394 (1916); Note, 29 HARV. L. REV. 77 (1915). See, *e.g.*, Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 186 (1871). *Cf.* The Schoolmaster Case, Y. B. Hillary, 11 Hen.IV, f.47, pl. 21 (1410).

22 COOLEY, TORTS 278 (1880).

23 See, *e.g.*, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 320–22 (1897); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915); Locker v. American Tobacco Co., 218 Fed. 447, 550 (2d Cir. 1914); Union Pacific Coal Co. v. United States, 173 Fed. 737, 739 (8th Cir. 1909); Whitwell v. Continental Tobacco Co., 125 Fed. 454, 460 (8th Cir. 1903); Dueber Watch-Case Mfg. Co. v. Howard Watch & Clock Co., 66 Fed. 637, 645 (2d Cir. 1895); *cf.* D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 358, 128 Pac. 1041, 1043 (1912); Grogan v. Chaffee, 156 Cal. 611, 615–16, 105 Pac. 745, 747–48 (1909); W. T. Rawleigh Medical Co. v. Osborne, 177 Iowa 208, 213, 158 N.W. 566, 568 (1916) (dictum); Commonwealth v. Grinstead, 111 Ky. 203, 205–06, 63 S.W. 427 (1901); Garst v. Charles, 187 Mass. 144, 148, 72 N.E. 839 (1905); Quinlivan v. Brown Oil Co., 96 Mont. 147, 152–53, 29 P.2d 374, 376–77 (1934); Fischer Flouring Mills Co. v. Swanson, 76 Wash. 649, 658–61, 137 Pac. 144, 147–49 (1913). See, generally, Brown, *The Right to Refuse to Sell*, 25 YALE L. J. 194, 195–98 (1916).

24 Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951).

25 See, *e.g.*, Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 625 (1953); A. C. Becken Co. v. Gemex Corp., 272 F.2d 1, 3 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960); Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F.2d 721, 726 (10th Cir. 1955); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 917 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (dissent); Bragan v. Hudson County News Company, 168 F. Supp. 231, 235 (D.N.J. 1958); Sperry Rand Corp. v. Nassau Research & Development Associates, 152 F. Supp. 91, 94 (E.D.N.Y. 1957).

26 342 U.S. at 155.

27 United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

28 Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

29 In *Black & Decker* Judge Moore stated:

> "For some forty years, the Colgate doctrine had 'become part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied.' (Dissenting opinion, Mr. Justice Harlan in United States v. Parke, Davis & Co., supra.) That they did so advise and did so rely is not open to doubt; whether they did so 'justifiably' in the light of warning signals during this period is more debatable" (277 F.2d at 789).

Significantly, to support this statement he cites only cases such as Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922), and United States v. Bausch & Lomb Co., 321 U.S. 707 (1944), in which the Court found that the seller had gone beyond mere refusal to deal and had engaged in concerted activity with its distributors.

30 "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word, to preserve the right of freedom to trade. In the absence of any purpose

to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own *independent* discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (emphasis added). See Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721–23 (1944); Binderup v. Pathe Exchange, 263 U.S. 291, 312 (1923); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 452–53 (1922); United States v. A. Schrader's Son, 252 U.S. 86 (1920); Victor Talking Machine Co. v. Kemeny, 271 Fed. 810, 817 (3d Cir. 1921).

31 A. C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960).

32 272 F.2d at 3–4.

33 Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11 (6th Cir. 1959).

34 See, *e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919); Adams-Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913, 916 (2d Cir. 1951); Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571, 573 (S.D.N.Y. 1919); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915), *affirming* 224 Fed. 566, 572–73 (S.D.N.Y. 1915); Union Pacific Coal Co. v. United States, 173 Fed. 737 (8th Cir. 1909); *cf.* McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 337 (4th Cir. 1959); Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (9th Cir. 1954), *cert. denied*, 348 U.S. 875 (1954); Hudson Sales Corp. v. Waldrip, 211 F.2d 268, 274 (5th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 915 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Green v. Victor Talking Machine Co., 24 F.2d 378, 382 (2d Cir. 1928), *cert. denied*, 278 U.S. 602 (1928).

35 The Court said that, as fashioned by the *Bausch & Lomb* and *Beech-Nut* cases, the scope of the *Colgate* doctrine was that "a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act" (362 U.S. at 43). Later in its opinion the Court gave specific application to the rule: "Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule" (*Id.* at 45–46).

37 Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 625 (1953); Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 337 (4th Cir. 1959); Standard Oil Co. v. Moore, 251 F.2d 188, 211 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 247 F. 2d 343, 358 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); Flintkote Co. v. Lysfjord, 246 F.2d 368, 376 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957); Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F. 2d 721, 725 (10th Cir. 1955); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 915 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Adams-Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913, 916 (2d Cir. 1951); Robinson v. Stanley Home Products, Inc., 174 F. Supp. 414, 418 (D.N.J. 1959); Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co., 173 F. Supp. 396 (D. Mass. 1959); Osborn v. Sinclair Refining Co., 171 F. Supp. 37, 44 (D. Md. 1959); Bragen v. Hudson County News Co., 168 F. Supp. 231, 235 (D. N.J. 1958); Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32, 37 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959); Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 779 (D.D.C. 1957), *aff'd per curiam*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959); Kinsey v. Knapp, 154 F. Supp. 263, 266 (E.D.

Mich. 1957), *rev'd on other grounds*, 249 F.2d 797 (6th Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); G. D. Searle & Co. v. Institutional Drug Distributors, 151 F. Supp. 715, 722 (S.D. Cal. 1957); Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790, 808 (M.D. N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958); Alexander v. Texas Co., 149 F.Supp. 37, 43 (W.D. La. 1957); United States v. New Orleans Insurance Exchange, 148 F.Supp. 915, 921 (E.D. La. 1957), *aff'd per curiam*, 355 U.S. 22 (1957); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 902 (D. Md. 1956), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); Klein v. Lionel Corp., 138 F.Supp. 560, 565 (D. Del. 1956), *aff'd*, 237 F.2d 13 (3d Cir. 1956); United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41, 51 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956); Naifeh v. Ronson Art Metal Works, Inc., 117 F. Supp. 690, 695 (W.D. Okla. 1953), *aff'd*, 218 F. 2d 202 (10th Cir. 1954); G & P Amusement Co. v. Regent Theatre Co., 107 F. Supp. 453, 459–60 (N.D. Ohio 1952), *aff'd per curiam*, 216 F.2d 749 (6th Cir. 1954), *cert. denied*, 349 U.S. 904 (1955); United States v. J. I. Case Co., 101 F. Supp. 856, 863 (D. Minn. 1951).

38 McElhenney v. Western Auto Supply Co., 269 F.2d 332, 337 (4th Cir. 1959).

39 362 U.S. at 44.

40 See note 35 *supra*.

41 Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, 252 U.S. 85, 99–100 (1920) (dictum); United States v. Colgate & Co., 250 U.S. 300 (1919); Adams-Mitchell Co. v. Cambridge Distributing Co., Ltd., 189 F.2d 913, 916 (2d Cir. 1951); Harriet Hubbard Ayer, Inc. v. Federal Trade Commission, 15 F.2d 274 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927); United States v. Hudnut, 8 F.2d 1010 (S.D.N.Y. 1925).

42 "In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy" (362 U.S .at 43).

43 See Handler, *Contract, Combination or Conspiracy*, 3 ABA ANTITRUST SECTION REP. 38 (1953).

44 Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 387 (1951).

45 Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960).

46 Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).

47 *Cf.* Osborn v. Sinclair Refining Co., 1960 Trade Cases par. 69,771 (4th Cir. 1960), decided after the oral presentation of this paper.

48 Kelly v. Kosuga, 358 U.S. 516 (1959).

49 Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843, 870–73 (1959).

50 Section 3 provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be

to substantially lessen competition or tend to create a monopoly in any line of commerce."

51 Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 473 (1923).

52 The *Gasoline Pump* case was discussed at considerable length in *Standard Stations*, where the Supreme Court took pains to point out: "The present case differs of course in the fact that a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has . . ." (337 U.S. at 303–04). Standard had endeavored to bring itself within the doctrine of the *Gasoline Pump* case by arguing that its contracts did not apply to all sales by a dealer, but only to those made through a designated service station. But the Supreme Court, after noting that "it does not appear that dealers commonly own more than one service station," held that: "there is marked difference between a contract which confines an entire retail outlet to the sale of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand. . . ." The essence of the Court's rationale was: "competition between suppliers is directed rather toward exclusive contracts with the maximum number of strategically located outlets than toward exclusive arrangements with dealers as such" (*Id.* at 304 n.6).

53 *Id.* at 310.

54 See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 145–48 (1955); HANDLER, ANTITRUST IN PERSPECTIVE c.II (1957); Handler, *Annual Review of Antitrust Developments*, 10 THE RECORD 332, 339 (1955); Handler, *Recent Antitrust Developments*, 9 THE RECORD 171, 180 (1954); Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORN. L.Q. 254, 275 (1960).

55 See, *e.g.*, Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843, 867 (1959); Handler, *Recent Antitrust Developments*, 13 THE RECORD 417, 434 (1958).

56 *Ibid.*

57 See, *e.g.*, United States v. Hambro Automotive Corp., 1960 Trade Cases par. 69,620, p. 76,497 (S.D.N.Y. 1960); United States v. Whitin Business Equipment Corp., 1960 Trade Cases par. 69,672, pp. 76,665–66 (D. Mass. 1960); United States v. New England Concrete Pipe Corp., 1959 Trade Cases par. 69,481, p. 75,881 (D. Mass. 1959); United States v. Bostitch, Inc., 1958 Trade Cases par. 69,207, p. 74,741 (D.R.I. 1958); United States v. American Type Founders Co., Inc., 1958 Trade Cases par. 69,065, p. 74,205 (D.N.J. 1958); United States v. American Body and Trailer, Inc., 1958 Trade Cases par. 69,063, p. 74,200 (W.D. Okla. 1958); United States v. Rudolph Wurlitzer Co., 1958 Trade Cases par. 69,011, p. 74,007 (W.D.N.Y. 1958); United States v. Necchi Sewing Machine Sales Corp., 1958 Trade Cases par. 68,957, p. 73,841 (S.D.N.Y. 1958); United States v. AMI Inc., 1957 Trade Cases par. 68,758, p. 73,099 (W.D. Mich. 1957); United States v. J. P. Seeburg Corp., 1957 Trade Cases par. 68,613, p. 72,479 (N.D. Ill. 1957); United States v. Philco Corp., 1956 Trade Cases par. 68,409, p. 71,753 (E.D. Pa. 1956); United States v. Reddi-Wip, Inc., 1955 Trade Cases par. 68,187, p. 70,877 (S.D. Cal. 1955); United States v. Liberty National Life Ins. Co., 1954 Trade Cases par. 67,801, p. 69,582 (N.D. Ala. 1954); United States v. Austenal Laboratories, Inc., 1951 Trade Cases par. 62,880, p. 64,616 (S.D.N.Y. 1951); United States v. Bendix Home Appliances, Inc., 1948–49 Trade Cases par. 62,346, pp. 62,899–900 (S.D.N.Y. 1948).

58 United States v. Volkswagen of America, Inc., 182 F.Supp. 405 (D.N.J. 1960).

59 The Government's brief concluded with the statement that:

"It is apparent that the Government has not sought to discuss the so-called

> authorities cited by [Volkswagen of America] in its memorandum in support of the motion. The reason is obvious. They do not refute the arguments made in the Government's memorandum, but are directed to questions which are either irrelevant to the questions to be decided here or to questions which need not and should not be decided here." Memorandum of the Government in Opposition to Motion by Defendant for Partial Dismissal of the Complaint, p. 23, United States v. Volkswagen of America, Inc., 182 F.Supp. 405 (D.N.J. 1960).

60 *Cf.* Reliable Volkswagen Sales & Service Co. v. World-Wide Automobile Corp., 182 F.Supp. 412 (D.N.J. 1960).

61 Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843 (1959); Handler, *Recent Antitrust Developments*, 13 THE RECORD 417, 436 (1958); Handler, *Annual Review of Recent Antitrust Developments*, 12 THE RECORD 411, 415 (1957); Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 381 (1956); Handler, *Annual Review of Antitrust Developments*, 10 THE RECORD 332, 334 (1955); Handler, *Recent Antitrust Developments*, 9 THE RECORD 171, 186 (1954).

62 Pillsbury Mills, Inc., Dkt. 6000, 50 F.T.C. 555 (1953), discussed in Handler, *Recent Antitrust Developments*, 9 THE RECORD 171, 186 (1954).

63 Handler, *Annual Review of Antitrust Developments*, 10 THE RECORD 332, 334 (1955).

64 *Compare* Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 381 (1956), *with* Barnes, *Quantitative Substantiality*, 8 ABA ANTITRUST SECTION REP. 11 (1956). Also *compare* Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record*, 7 MERCER L. REV. 279 (1956), *with* Celler, *Corporation Mergers and Antitrust Laws*, 7 MERCER L. REV. 267 (1956).

65 United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956), discussed in Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 391 (1956).

66 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), discussed in Handler, *Annual Review of Recent Antitrust Developments*, 12 THE RECORD 411, 415 (1957).

67 Brillo Mfg. Co., FTC Dkt. 6557, Trade Reg. Rep. par. 27,243 (1958), discussed in Handler, *Recent Antitrust Developments*, 13 THE RECORD 417, 436 (1958).

68 Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843 (1959).

69 United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), *appeal filed*, April 1, 1960.

70 Crown Zellerbach Corp., FTC Dkt. 6180, Trade Reg. Rep. par. 26,923 (1957).

71 A. G. Spalding & Bros., Inc., FTC Dkt. 6478, Trade Reg. Rep. par. 28,694 (1960).

72 Reynolds Metals Co., FTC Dkt. 7009, Trade Reg. Rep. par. 28,533 (1960), *petition to reopen denied*, Trade Reg. Rep. par. 28,666 (1960).

73 See Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843, 844 n.6, 845 n.12 (1959); notes 75 and 76 *infra*.

74 United States v. Anheuser-Busch, Inc., 1960 Trade Cases par. 69,599 (S.D.Fla. 1960); United States v. Lucky Lager Brewing Co., 1958 Trade Cases par. 74,538 (D.Utah 1958); United States v. Schenley Industries, Inc., 1957 Trade Cases par. 72,700 (D.Del. 1957); United States v. General Shoe Corp., 1956 Trade Cases par. 71,227 (M.D.Tenn. 1956); United States v. Hilton Hotels Corp., 1956 Trade Cases par. 71,171 (N.D.Ill. 1956); United States v. Minute Maid Corp., 1955 Trade Cases par. 70,673 (S.D.Fla. 1955); Diamond Crystal Salt Co., FTC Dkt. 7323 (Feb. 4, 1960); Gulf Oil Corp., FTC Dkt. 6689 (Jan. 5, 1960); Automatic Canteen Co. of

America, FTC Dkt. 6820 (June 23, 1958); The Vendo Co., FTC Dkt. 6646 (Sept. 6, 1957); International Paper Co., Dkt. 6676, 53 F.T.C. 1192 (1957); Scovill Mfg. Co., Dkt. 6527, 53 F.T.C. 260 (1956); Union Bag & Paper Corp., Dkt. 6391, 52 F.T.C. 1278 (1956).

75 United States v. Kennecott Copper Corp., Civ. 147–231 (S.D.N.Y. June 22, 1959); United States v. Diebold Inc., Civ. 4485 (S.D.Ohio Aug. 24, 1959); United States v. United Artists Corp., Civ. 150–267 (S.D.N.Y. Sept. 15, 1959); United States v. Pabst Brewing Co., Civ. 59–C215 (E.D.Wis. Oct. 1, 1959); United States v. General Motors Corp., Civ. 151–370 (S.D.N.Y. Oct. 16, 1959); United States v. National Homes Corp., Civ. 114 (N.D. Ind. Nov. 20, 1959); United States v. Standard Oil Co. (Ohio), Civ. 19696 (E.D.Mich. Dec. 31, 1959); United States v. National Steel Corp., Civ. 13032 (S.D.Tex. Feb. 15, 1960); United States v. Von's Grocery Co., Civ. 336–60–WM (S.D.Cal. March 25, 1960); United States v. Aluminum Co. of America, Civ. 8030 (W.D.N.Y. Apr. 1, 1960); United States v. Gamble-Skogmo, Inc., Civ. 12776 (W.D.Mo. Apr. 1, 1960).

76 ABC Vending Corp., FTC Dkt. 7652 (Nov. 4, 1959); Simpson Timber Co., FTC Dkt. 7713 (Jan. 4, 1960); Warner Co., FTC Dkt. 7770 (Feb. 4, 1960); Crane Co., FTC Dkt. 7833 (March 18, 1960); Continental Baking Co., FTC Dkt. 7880 (May 5, 1960).

77 Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

78 United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D.Mo. 1959), *appeal filed*, April 1, 1960.

79 United States v. E. I. du Pont de Nemours & Co., 177 F. Supp. 1 (N.D.Ill. 1959), *probable jurisdiction noted*, 362 U.S. 986 (1960).

80 United States v. Anheuser-Busch, Inc., 1960 Trade Cases par. 69,599 (S.D.Fla. 1960).

81 Brillo Mfg. Co., FTC Dkt. 6557 (Nov. 26, 1958), *rev'd*, Trade Reg. Rep. par. 28,667 (1960).

82 A. G. Spalding & Bros., Inc., FTC Dkt. 6478 (Feb. 26, 1959), *rev'd*, Trade Reg. Rep. par. 28,694 (1960).

83 Erie Sand & Gravel Co., FTC Dkt. 6670, Trade Reg. Rep. par. 28,358 (1959).

84 Reynolds Metals Co., FTC Dkt. 7009, Trade Reg. Rep. par. 28,533 (1960), *petition to reopen denied*, Trade Reg. Rep. par. 28,666 (1960).

85 Pillsbury Mills, Inc., FTC Dkt. 6000 (Feb. 19, 1959).

86 Scott Paper Co., FTC Dkt. 6559 (Jan. 13, 1960).

87 Since the oral presentation of this paper, Judge Herlands snapped the Government's victory string when he dismissed the complaint in United States v. Columbia Pictures Corp., 1960 Trade Cases par. 69,766 (S.D.N.Y. 1960), after trial. The court thereby sustained the legality of Screen Gems' acquisition of an exclusive 14-year license to distribute Universal's pre-1948 feature films to television.

88 United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), *appeal filed*, Apr. 1, 1960.

89 179 F. Supp. at 727.

90 *Id.* at 739.

91 H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

92 *Ibid.* (emphasis added).

93 *Ibid.*

94 38 STAT. 731 (1914).

95 See H.R. REP. No. 1191, 81st Cong., 1st Sess. 6, 7–8 (1949); S. REP. No. 1775, 81st Cong., 2d Sess. 4 (1950).

96 International Shoe Co. v. Federal Trade Commission, 280 U.S. 291 (1930).

97 *Id.* at 298.

98 H.R. REP. No. 1191, 81st Cong., 1st Sess. 7 (1949).

99 95 CONG. REC. 11486–87 (1949); 96 CONG. REC. 16435 (1950).

100 H.R. REP. No. 1191 at 6.

101 S. REP. No. 1775 at 4.

102 179 F. Supp. at 737.

103 Motion to Affirm by the United States, p. 7, United States v. Brown Shoe Co., Dkt. No. 65, October 1960 Term.

104 *Id.* at 15.

105 *E.g.*, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955); FEDERAL TRADE COMMISSION REPORT ON CORPORATE MERGERS AND ACQUISITIONS 162, 180–85 (1955); Barnes, *Quantitative Substantiality*, 8 ABA ANTITRUST SECTION REP. 11 (1956); Address by Attorney General Brownell, National Industrial Conference Board, November 17, 1955; Address by Assistant Attorney General Barnes, Northwestern University Law School, May 10, 1955; Address by Attorney General Brownell, New York Chapter of the Public Relations Society of America, September 30, 1954; Gwynne, *The Federal Trade Commission and Section 7*, 1 ANTITRUST BULL. 523, 529 (1956); Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N. Y. U. L. REV. 1143, 1189 (1955).

106 See, *e.g.*, American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527 (2d Cir. 1958); Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953); United States v. Columbia Pictures Corp., 169 F.Supp. 888, 896 (S.D.N.Y. 1959); Scott Paper Co., FTC Dkt. 6559, Trade Reg. Rep. par. 27,716, p. 36,843 (1959); Brillo Mfg. Co., FTC Dkt. 6557, Trade Reg. Rep. par. 27,243, p. 36,625 (1958); Crown Zellerbach Corp., FTC Dkt. 6180, Trade Reg. Rep. par. 26,923, p. 36,461 (1957); Pillsbury Mills, Inc., Dkt. 6000, 50 F. T. C. 555 (1953). See also United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 603 n.51 (S.D.N.Y. 1958).

107 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955).

108 Since the oral presentation of this paper, probable jurisdiction was noted by the Supreme Court in *Brown Shoe* [363 U.S. 825 (1960)].

109 179 F. Supp. at 728–29.

110 Handler, *Recent Antitrust Developments*, 13 THE RECORD 417, 446 (1958).

111 United States v. E. I. du Pont de Nemours & Co., 177 F. Supp. 1, 14 (N.D.Ill. 1959), *probable jurisdiction noted*, 362 U.S. 986 (1960).

112 Jurisdictional Statement of the United States, pp. 9–10, United States v. E. I. du Pont de Nemours & Co., Dkt. No. 55, October 1960 Term.

113 Handler, *Recent Antitrust Developments*, 13 THE RECORD 417, 449 (1958).

114 177 F. Supp. at 16–17.

115 *Id.* at 17.

116 Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

117 *Id.* at 473.

118 *Ibid.*

119 177 F. Supp. at 11.

120 United States v. Anheuser-Busch, Inc., 1960 Trade Cases par. 69,599 (S.D.Fla. 1960).

121 United States v. Anheuser-Busch, Inc., Civ. No. 8906-M (S.D.Fla. Jan. 22, 1959).

122 Brief for the United States, p. 6, United States v. Anheuser-Busch, Inc., Civ. No. 59-C-215 (E.D.Wis.).

123 United States v. Pabst Brewing Co., 1960 Trade Cases par. 69,700 (E.D.Wis. 1960).

124 Transcript, p. 42, Oral Argument on Motion for Summary Judgment of Dismissal, United States v. Pabst Brewing Co., 1960 Trade Cases par. 69,700 (E.D.Wis. 1960).

125 Motion for Preliminary Injunction, United States v. Pabst Brewing Co., Civ. No. 59-C-215 (E.D.Wis.).

126 Handler, *Annual Review of Antitrust Developments*, 12 THE RECORD 411, 440 (1957).

127 69 STAT. 283 (1955), 15 U.S.C. §16.

128 *Compare* United States v. Rubber Mfrs. Ass'n, 1959 Trade Cases par. 69,435 (S.D.N.Y. 1959), *and* United States v. Safeway Stores, Inc., 20 F.R.D. 451 (D. Tex. 1957) (accepting pleas of *nolo*), *with* United States v. Westinghouse Electric Corp., 1960 Trade Cases par. 69,694 (E.D. Pa. 1960) (rejecting plea). See also United States v. Pittsburg Plate Glass Co., 1957 Trade Cases par. 68,822 (W.D. Va. 1957) (plea rejected; no mention of Government's position). *Cf.* United States v. Beatrice Foods Co., 1959 Trade Cases par. 69,241 (D. Neb. 1958).

129 1959 Trade Cases par. 69,482 (S.D. Ohio 1959), 1960 Trade Cases par. 69,695 (S.D. Ohio 1960).

130 Not knowing the facts of this litigation, no opinion is expressed as to the propriety of the sentence; the text deals solely with the court's reasoning and the implications of its policy.

131 Hudson v. United States, 272 U.S. 451, 453 (1926). See, *e.g.*, Commonwealth v. Horton, 9 Pick. (Mass.) 206 (1829); Commonwealth v. Holstine, 132 Pa. 357, 68 Atl. 634 (1890).

132 United States v. B. F. Goodrich Co., 1957 Trade Cases par. 68,713, p. 72,877 (D. Colo. 1957). See, *e.g.*, Hudson v. United States, 272 U.S. 451 (1926); Tucker v. United States, 196 Fed. 260 (7th Cir. 1912).

133 FED. RULES CRIM. PROC. 11.

134 Rule 11, like the other criminal rules, took effect only after having been reported to Congress. See Act of June 29, 1940, c.445, 54 STAT. 688. And in United States v. B. F. Goodrich Co., 1957 Trade Cases par. 68,713, pp. 72,877–78 (D.Colo. 1957), the court found evidence in the legislative history of Section 5 of the Clayton Act of Congressional approval of the use of the *nolo* plea in antitrust litigation.

135 1959 Trade Cases at p. 75,833.

136 The Annual Report for fiscal 1959 was unavailable at the time this lecture was prepared.

137 United States v. Arkansas Fuel Oil Corp., 1960 Trade Cases par. 69,619 (N.D. Okla. 1960).

138 United States v. Eli Lilly & Co., 24 F.R.D. 285 (D.N.J. 1959).

139 Letter of Acting Assistant Attorney General Robert A. Bicks, March 30, 1960, 2 Trade Reg. Rep. par. 8241.695. The Justice Department has already applied this policy in at least one case. See New York Herald Tribune, March 11, 1960.

"Even if these requirements are met," Mr. Bicks added, "the decision whether or not to accept a consent decree without an admission of liability would turn on a balance of the value of relief foregone or postponed as against the extent of injury to the city or state."

140 *Ibid.*

141 UNITED STATES DEPARTMENT OF JUSTICE ANNUAL REPORT (1958).

142 Department of Justice Release, Jan. 4, 1960.

Toward the Best Possible Judges

By Roger Bryant Hunting

Each year, as Election Day is upon us, we discover that among the names on the ballot are those of a number of candidates for the office of judge. Most of the candidates names are totally unfamiliar to the public and, for that matter, to the great bulk of the Bar in the City. Indeed, the names of the courts in which they seek to serve are a mystery to most of our citizenry, and to a surprising number of our lawyers as well. And so, once again, attention turns to the men who are and who become our judges, and from all sides suggestions are heard that "something should be done" to insure that only lawyers of high calibre shall don judicial robes.

Last year, the mumuring again arose, based upon the candidacy of Samuel R. Pierce for the office of Judge of The Court of General Sessions of New York County—our highest criminal court. Judge Pierce, a Republican, already held (and now holds again) that office by appointment of Governor Rockefeller to fill a vacancy. Francis W. H. Adams, an independent and "reform" Democrat, and distinguished former Police Commissioner, announced his support of Judge Pierce and was quoted as saying,

> "I have been an independent Democrat all my life. I have always felt that politics should have nothing to do with judges. It was a shocking thing to me that Judge Pierce was not given the Democratic nomination, he is such a highly qualified man. I think the whole system of selecting judges is wrong, and something should be done about it."

The article in the *New York Times* of October 14, 1959, which thus quoted Mr. Adams then went on to demonstrate just how political a matter the selection of judges is. It pointed out that if Judge Pierce were to be elected, in spite of the lack of the Democratic nomination, it might bring about the downfall of Carmine DeSapio as County Democratic Leader, a result which

had not been accomplished by the "reform" Democrats led by Mr. Adams, Mrs. Eleanor Roosevelt, former Senator Lehman and Mr. Thomas K. Finletter, in the Democratic primaries held earlier that fall.

The purpose of this article is to make a concrete suggestion of that "something" that "should be done," a suggestion which has not yet, I think, been made.

The statement that the most highly qualified men, who are willing to serve, should be made judges is one upon which there is very little room for disagreement. It is a goal sought by all. It is undoubtedly true that in some places the most highly qualified men, who are willing to serve, are made judges. But there are many who contend with strong conviction that in other places, in New York City and State, the men who are made judges are not the most highly qualified men who are willing to serve. In this State many who hold the second point of view believe that a change in method of selection of judges would result in the selection of more highly qualified men for the available positions. The methods advocated are many, but most, like the "Missouri Plan," involve a change from the elective method now in use and the creation of a system of appointive judges—with or without some method of presenting to the appointing power a limited number of names from which each appointment must be made. At this point arises the bitter controversy between the advocates of change and those who cry out in horror at any departure from our "traditional, democratic elective system."

It seems to me, however, that the controversy over methods of selection has to some extent obscured the goal which all must be seeking—again, that the most qualified men who are willing to serve be made judges. It seems possible that all will agree that if the men who reach the bench are highly qualified, then the method by which they are selected is, in fact, of relatively little importance.

SOME PRELIMINARY POINTS

A number of preliminary points should now be noted:

First, there is some doubt that one method of selection is

actually more likely to produce qualified judges than another. In the City of New York, for example, judges are elected by the people to the City Court which has standing very comparable to the Court of Special Sessions where the judges are appointed by the Mayor. There has been no evidence presented nor, indeed, any statement made, that either body of judges is superior to the other. So too, the appointed magistrates of the City Magistrates' Courts and the elected judges of the Municipal Court are judges of comparable courts, and no evidence exists which would indicate that either bench is superior to the other. Again, the Federal District Court for the Southern District of New York may be regarded as comparable to the New York Supreme Court in the First Department (Manhattan and the Bronx). Experienced lawyers may differ on which bench is more distinguished at any given time, but all will, I think, agree that in fact there is little difference in the qualification of judges on each bench, and probably no difference that could be attributed to the method of selection

The calibre of judges of other States cannot, of course, be easily compared with those in New York due not only to difference in method of selection, population, judicial business, compensation, and so on, but also the traditions and customs of various States with regard to judges. It is clear, however, that no concrete demonstration has been made that judges appointed are better than judges elected, or vice versa.

Second, it might be said that, regardless of the high qualifications of the good judges on the bench, a failure of one method or the other is indicated by the occurrence of so-called "judicial scandals," or the exposure of the effect of influence, bribery or other corruption in a judge. It is clear, however, that no court is immune from an occasional failure of this type, nor is any particular method of selection. The indictment and conviction of a corrupt judge of an appointive Federal court may be matched by similar disclosures in elective State courts. Nor is corruption limited to the metropolis. Corruption may be found, as we have recently seen in Suffolk County on the lowest judicial level, among elective Justices of the Peace, as well as occasionally

among elective Surrogates or County Judges. Method of selection seems to have little relationship to "judicial scandal" and no method can guarantee infallibility, in view of the infinite possibilities of human susceptibility.

Third, it may be contended that one method or another might either eliminate or reduce the "politics" in judicial selection, or at least eliminate the need for one aspiring to be a judge to be active politically. This point has been dealt with in a variety of ways—all of which may be summed up simply. Man is a political being and as long as positions exist to which candidates may aspire, some species of bargaining, jockeying and exchange of influence and favor will exist, whether within the framework of the political parties or otherwise. As is well known, those who achieve the appointive benches move through political channels almost identical to those who reach the elected benches. It is clear, too, that unless lifetime tenure is established, successive terms, whether elective or appointive probably involve some "politics" but, because of the custom of continuing sitting judges in office, this is usually kept to a minimum, although not as noted in the case of Judge Pierce.

The creation of a panel which would present a list of names from which an appointment must be made could not avoid the problem of politics. Not only would political activity be indulged in by those aspiring to judgeship, to make themselves well and favorably known to the panel, but the panel itself would probably have a political flavor.

Assume, for example, a panel which would be created to present to the Governor three names for a vacancy in the Supreme Court, First District. It seems very likely, in view of the present political, religious and racial composition of New York City, that any such panel would necessarily be composed of members, however selected, who would be "representative" of those elements in our population which are, through our present methods of "balancing the ticket," now represented in City and State Government and on the bench. Thus, one or more Republicans, Democrats, Catholics, Jews, Italians, Irishmen, Negroes, Protes-

tants, lawyers, laymen, and so on would be demanded for the panel. While undoubtedly several of these might be represented by one panel member, such as a Protestant Republican or a Catholic Irishman, in all likelihood a seven man panel would result. Any name agreed upon by all seven of these "representative" views would certainly have to be a very uncontroversial figure, undoubtedly a compromise candidate who was skillful in avoiding controversy while still achieving a position of prominence which would make him a likely Supreme Court Justice. In short, a rather adroit politician.

The most ludicrous illustration of this attitude occurred last year in connection with the failure of the Democratic party to nominate Judge Pierce, the Republican incumbent. Congressman Adam Clayton Powell took Mr. DeSapio severely to task and issued the statement that the failure of the Democrats to nominate a Negro for the post deprived that segment of the community of a position that "belonged" to it. He went on to say, in substance, that since Negroes made up perhaps 28% of the population in New York City, that 28% of the "patronage" should be distributed to Negroes. He has since, together with the Harlem "United Leadership Team" reiterated this philosophy. Aside from the point that the various percentages of Negroes, Republicans, Jews, Catholics, Democrats, Italians, Liberals, Protestants, Capitalists, Laboring men and so on in the population who might also similarly demand "their share" of the patronage totals somewhat over 100%, the statement reflects the pernicious idea that judicial office itself is a species of political patronage, a conception which all should, I think, like to eradicate.

Probably, however, no panel could exist without some political consciousness. This was most sharply revealed a few years ago by the nominating panel in Missouri which presented the names of three Democrats to the Democratic Governor for one vacancy, and within a few weeks presented him with the names of three Republicans for another. This insured, for the first time, the

appointment by a Governor of a judge not of his own political party. The purpose of the panel in this maneuver may have been entirely praiseworthy, but it does not instill confidence that panels generally are an effective way of preventing political considerations from entering into the selection of judges.

Fourth, a last preliminary point which may be made is that some lawyers want to be judges, while others, extraordinary as it may seem, do not. This is sometimes overlooked by those who urge a change from the elective system, stressing that under the elective system lawyers who don't wish to be active in politics do not receive consideration as possible candidates. This may, to an extent, be so. However, most lawyers who want to be judges do engage in an active political life—whether their goal is an elective or an appointive bench. Further, it is true that political leaders, on occasion, seek as a judicial candidate a prominent lawyer, who declines elevation to the bench. Few examples of this appear to be known, but they do exist.

It is true, too, that distinguished judges differ as to whether or not political activity is a detriment in the make up of a judge. Arthur T. Vanderbilt, the late, great Chief Justice of New Jersey, held it to be an unqualified evil, to be eliminated. On the other hand, David W. Peck, former Presiding Justice of the Appellate Division, First Department, maintained that political activity was an essential in building a well rounded lawyer who would make the best judge.

It may be that there are lawyers presently practicing in New York who have declined appointment to the Federal bench, or nomination to the State Supreme Court bench. If so, change in method of selection would not alter this situation and thus it is probably true that many highly qualified men, because of their personal inclinations, will never ascend the bench, regardless of method of selection employed.

A PROPOSAL

The goal which is sought is to restrict elevation to the bench to a group of men who wish to be judges and who have high

qualifications. This can be accomplished entirely without relation to method of selection by this requirement: No person's name shall be placed on a ballot for, nor shall any person be appointed to, judicial office, unless he shall have been found to be qualified to be a judge. Evidence of qualification shall be a "Certificate of Qualification" issued by a "State Board of Judicial Qualification," to which any person who wished to be eligible for appointment or election to the bench could submit himself, with a request for a finding as to his qualification.

It should be pointed out immediately that this is not a proposal to have judges selected by a species of civil service examination, nor is it a proposal that persons nominated or appointed should thereafter be required to prove to the satisfaction of a board that they are qualified to serve.

This is simply a proposal that there be a second step required beyond mere admission to practice as a lawyer before one can be regarded as qualified to ascend the bench. This second step could be taken by any lawyer who wished to be in a position to accept a nomination or an appointment to the bench. He could, whenever he believed his experience and standing justified it, make application to the State Board of Judicial Qualification for a Certificate of Qualification. The Board would submit him to such examination and investigation as it deemed necessary to determine his qualifications and issue the Certificate if he was qualified.

Of course, the immediate question one asks at this point is—what are the standards for judgeship and how does any Board determine whether or not an applicant is qualified? While there is undoubtedly a large intangible element in judicial qualifications, it is clear that three major areas are involved.

1. Legal ability and standing.
2. Judicial temperament and stature.
3. Moral integrity and ethical conduct.

Clearly too, the work of the State Board of Judicial Qualification would not be to devise meticulous written examinations to test the legal ability of an applicant. Certain standards could be

set up which might more or less formally take care of that phase of the problem, such as a certain number of years at the bar, a demonstrable experience in trial and appellate work, or perhaps the holding of specific offices such as District Attorney or Corporation Counsel. All the other elements—legal standing (as contrasted with legal ability), judicial temperament, moral and ethical considerations—are not subject to examination in the accepted sense. They are matters which may, however, be objectively determined. Investigation by State Police, personal interview by the Board, interview and information supplied by legal associates or opponents, Bar Association activities, civic and charitable organization activities and political activities would aid in this determination.

It must be stressed, though, that the major concern of those who wish a change in our method of selecting judges is not that judges selected by the present method lack legal ability or even, for the most part judicial temperament, *but that they sometimes lack the moral integrity which is required of a judge.* This view is seldom expressed publicly, but is privately held by many. Therefore, the real concern of the State Board of Judicial Qualification would probably be for the moral integrity of the applicant—and interview and investigation could be most effective in making a determination upon that point.

In practice, perhaps, an applicant who had reasonable legal ability and reasonable judicial temperament and the highest of moral integrity should receive a Certificate of Qualification. On the other hand, an applicant who had high legal ability and good judicial temperament but found to have inferior moral integrity would not receive a Certificate. With these standards worked out, it might be that a high percentage of applicants would be found qualified. But those whose moral standards fell short would be excluded, and it is to exclude that group that is the goal of all who seek to elevate judicial calibre. It would seem safe to leave to the electorate or the appointing power the problem of choosing from the group who receive Certificates the best qualified legally and temperamentally to go upon the bench.

These ideas are not exhaustive, but without doubt, with time

and an adequate staff the Board could devise and execute methods of determining standing and qualifications of applicants for Certificates of Qualification. Once issued a Certificate, an attorney would be eligible for election or appointment as a judge, in the event, of course, that any party wished to nominate him, or any appointing authority desired to appoint him.

SOME PROS AND CONS

The establishment of a system of certification such as this, which would limit positions on the bench to men of a proven higher qualification than mere admission to the Bar is not revolutionary, even though it does not at present exist in any State. Somewhat analogus situations do, however, exist in some places. For example, in New Jersey, until recently, two grades of lawyer existed. On admission to the Bar one became an attorney. Thereafter, on completion of one full school year of training of two hours a week for 30 consecutive weeks in an approved school, on subjects including appellate procedure, legal research, evaluation of authorities, preparation of briefs, and oral advocacy, an attorney, after examination, received a Certificate as Counsellor. Only those who possessed such a Certificate could practice in the Appellate Courts. While standing as a Counsellor was not required of candidates for judicial office, it was obviously a handy guide to the appointing power in assessing the qualifications of a possible judge.

So, too, in England, the Bar has classifications of Solicitor and Barrister. Barristers, who are the trial advocates, are further classified, and those who are especially highly qualified are, on recommendation by the Attorney General, designated as Queen's Counsel. Appointments to the bench are made only from among Queen's Counsel. Thus, the method of selection of judges in England may, in fact, have but little to do with the calibre of the bench there, since it draws upon a limited pool of possible appointees, all of whom are highly qualified.

It might be argued by some that the requirement of a Certificate of Qualification before a man could be nominated or elected

to the bench is a restriction upon the freedom of choice of the electorate. This, however, is not a valid point since the electorate, now, is free to choose as judges only those who have met certain qualifications, including membership in the Bar of the State, age under 70, residence in the area or district concerned, or, as to some courts, a specified number of years at the Bar. The present proposal would simply add a further limitation—that one who aspires to judicial office have demonstrated to the satisfaction of an impartial board that he is qualified for judicial office.

It could be said that the proposed State Board of Judicial Qualification might be corrupt, that its certificates might be granted through political or personal favoritism or that it might yield to great pressures put upon its members to grant certificates to persons regardless of their real qualifications. This seems unlikely. For example, although it only gives written examinations, the present State Board of Law Examiners conceivably might be placed under such pressures, but it has not sacrificed its integrity in the conduct of examinations. No one is now admitted to the Bar through the exercise of political or other influence. So too, the local Character Committees in each Department are conscientious in the screening of candidates for the Bar on the basis of their character. There seems to be no reason to believe that a State Board of Judicial Qualification, with high official standing and prestige, important functions, and men of integrity serving upon it, would fail to live up to the highest standards.

In addition, since the function of the Board would, in passing upon the qualifications of individuals who present themselves to it, be a general one, rather than a specific function of passing upon persons who have already been nominated or appointed as judges, there will be less reason for pressures to be brought to bear on behalf of individual applicants. The Board would function on a year-round basis, with its work constantly in progress and applicants who failed to obtain a Certificate of Qualification could be given further opportunities from time to time, as are applicants for admission to the Bar at present.

It could be argued that the salary necessary to attract the right type of man to serve upon the Board, and the cost of the staff required, would be unduly expensive. It may be that such a Board would cost a good deal, but if real concern is felt about raising the calibre of judges, cost should not be a controlling consideration in assessing suggestions which might bring that about.

THE MAKE-UP OF THE BOARD

A number of ways of making up the Board of Judicial Qualification are possible. Its members could be elected, appointed or otherwise chosen by any of a number of officers or bodies, including the Judicial Conference, the Court of Appeals, the Governor, the Bar itself, and so on. I think that the simplest way, and, perhaps, the best way, would be to have the Board consist of seven members appointed by the Governor on nomination of the Judicial Conference and with the advice and consent of the Senate. It might be wise to provide also that no more than four of the members of the Board could be of the same political party and that at least one must be from each Judicial Department of the State.

A Board made up of such distinguished men as Harrison Tweed, Whitney North Seymour, Francis W. H. Adams, Morris Ernst, Robert Dowling, Lewis Ryan, Winthrop Aldrich, Joseph Proskauer, John Hughes and the like would command the confidence of all.

CONCLUSION

This, in summary, is my proposal for making sure that only the most highly qualified men who are willing to serve be made judges—regardless of whether the method of selection be elective or appointive.

1. That there be established a State Board of Judicial Qualification.

2. That the Board have the duty to determine the qualifications and grant or refuse a Certificate of Qualification to any lawyer who applies for such a Certificate.

3. That provision be made in the law that no person may be appointed a judge of any court, nor may the name of any person be placed upon any ballot for election as a judge of any court, unless he shall have a Certificate of Qualification issued by the State Board of Judicial Qualification.

The adoption of this proposal would focus our attention, at last, not on methods, but on results, and, by making sure that the pool from which judges came was of high calibre, we would be assured that those named, by whatever method, would be worthy of the post. And if, on Election Day, we found the names listed for judicial office were unknown to us, we could vote with confidence that the moral integrity and qualification of these candidates had been approved by a Board whose members we would know, and of whose dedication and standing we would have no doubts.

"Don't Tell Me How It Ends" – A Review*

By LEWIS M. ISAACS, JR.

Here is a book on leases that puts an end to the need for any other book on the subject, except for collectors. The author denies that it is a book. He calls it a monograph. The difference is as significant as the difference between a contract and an agreement.

The author also denies that it is a treatise. He may be right (as he so often is) but it looks like a treatise. It has footnotes and citations, appendices and schedules and forms and an index. It has a preface that explains its objects and it covers just about every subject a landlord or tenant, or a lawyer for either might be concerned with. To this reader, that is a treatise even if it lacks extended arguments or explanations. Perhaps that makes it a short treatise.

A treatise cannot be reviewed. It can be criticized or it can be praised. But a review has been ordered by the Editor of THE RECORD, so ————————

* * *

The monograph-book opens, as Alice advised the Rabbit all good books should, with a Chapter I. The style, if style it be, is that of a conveyancer—precise but not pretty, functional but not funny. Yet it has humor. If it does not provide all the answers to all the problems of landlords and tenants it does at least ask and answer a dozen questions and point out many problems that might not occur to the ordinary garden variety of lawyer, which constitutes the bulk of our Association's membership.

How many readers of THE RECORD would consider, for example, the drinking habits of a landlord or tenant before preparing a lease? Yet Mr. Friedman, opening his brochure, advises that "The first thing that should appear in a lease . . . is the correct names and addresses of the landlord, their capacity and . . . the nature of their entities." (My landlord's capacity is three quarts). Nor does the wise author limit himself to drinking habits. He warns that "If a landlord is a married man" and his wife is alive, it may be necessary to "bind her dower." Fair warning, to be sure, though he fails to provide even by footnote an inkling as to where a dower-binder may be bought.

There are other fascinations in this 186 page book, not the least of which is that the conclusion appears on page 138 followed by a poem.

There are intriguing appendices too, one of which is a schedule of rates or percentages paid by different types of stores in various communities. The schedule provides the useful information that there are, or seem to be, no

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Editor's Note: Mr. Isaacs is a Vice-President of the Association and a former Chairman of its Committee on Real Property Law.

* Milton R. Friedman, "Preparation of Leases" (New York Practising Law Institute; 1960).

beauty shops in San Francisco, no fur stores in Phoenix, Arizona, no place to buy women's shoes in Jacksonville, Florida, no taverns in Baton Rouge, Louisiana; but women's furnishings are available in volume in every town and community of the United States. Why this information is relevant in the preparation of leases may not be crystal clear, but it surely has significance beyond its announced object of fixing the proper percentages to be applied to those whose rent is not a part of fixed overhead.

To residents of this rent-controlled City, the happiest (or perhaps the most provocative) note is to be found in the author's example of the completely filled out form of "Work Sheet" for attachment to a lease. The form is typical in limiting the landlord's liability. It is only untypical in describing the landlord's obligation. Under the words "COMPLETE REDECORATION" appear the following:

"Wash down walls (do not paint)
Touch up window sills only
Install radiator cover"

One may ask what decoration in such circumstances would be less than complete? The author does not say. We suggest the answer can be supplied by the Rent Commissar.

* * *

We have said the book cannot be reviewed. The point, we hope, is proven (although we recognize that what is one man's mete is another man's bound). It is enough, for us, to say that the book is written by a (nay THE!!) authority on Real Estate Law; that it provides precedents and examples for each of its pronouncements; and that it is readable, portable and valuable to anyone contemplating an agreement or concerned with a disagreement between a landlord and a tenant.

Committee Reports

COMMITTEE ON INTERNATIONAL LAW

CERTAIN ARTICLES OF DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS

At the suggestion of the Director of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, Professors Louis B. Sohn and R. R. Baxter of the Harvard Law School, have prepared a draft "Convention on the International Responsibility of States for Injuries to Aliens." It is contemplated that, on its completion in final form, the draft Convention will be presented by the United Nations Secretariat to the United Nations International Law Commission for its consideration.

This report of the Committee on International Law has been prepared both to draw the attention of the membership of the Association, and particularly those who are not active in the field of international law, to the draft Convention which has not yet received the general professional attention which the importance of the subject and general excellence of the draft merit, and to summarize serious reservations which the Committee has with respect to certain proposals of the present draft which the Committee considers will be inimical to private international investment.

The Articles of this draft Convention of most general interest to practicing lawyers are those relating to a State's international responsibility for a "taking and deprivation of use or enjoyment of property" (Article 10) and for "annulment and nonperformance of contracts and concessions" (Article 12), and those governing the damages or other relief to be awarded (Articles 32 and 34). The draft Convention regards the international wrongs described in Articles 10 and 12 as separate and independent from any denial of justice that may occur when the injured alien seeks redress under the local law. The exhaustion of local remedies is ordinarily a procedural or jurisdictional condition to an assertion of such international wrongs.

The most recent drafts of these articles, which were discussed at the annual meeting of the American Society of International Law in Washington on April 28, 1960, are as follows:

ARTICLE 10

(Taking and Deprivation of Use or Enjoyment of Property)

1. The taking, under the authority of the State, of any property of an alien, or of the use thereof is wrongful:

(a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or

(b) if it is in violation of a treaty.

2. The taking, under the authority of the State, of any property of an alien, or of the use thereof for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation in accordance with the higher of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property unaffected by this or other takings or, if no market value exists, in terms of the fair value of such property. If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty.

3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

4. If property is taken by a State in furtherance of a general program of economic and social reform, the just compensation required by this Article may be paid over a reasonable peroid of years, provided that:

(a) the method and modalities of payment to aliens are no less favorable than those applicable to nationals;

(b) a reasonable part of the compensation due is paid promptly;

(c) bonds bearing a reasonable rate of interest are given to the alien and the interest is paid promptly; and

(d) the taking is not in violation of an express undertaking by the State in reliance on which the property was acquired or imported by the alien.

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws, from a general change in the value of currency, or from the action of the competent authorities of the State in the maintenance of public order, health, or morality, or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory voliation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention*;

(c) it is not an unreasonable departure from the principles of justice generally recognized by municipal legal systems; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

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* Articles 6 through 8 protect the alien against a denial of justice by the State's judicial tribunals or administrative authorities.

6. The compensation and interest required by this Article shall be paid in the manner specified in Article 39.†

7. The term "property" as used in this Convention comprises all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property.

8. The responsibility of a State for the annulment or nonperformance of a contract or concession is determined by Article 12.

ARTICLE 12

(Annulment and Nonperformance of Contracts and Concessions)

1. The annulment by a State of a contract or concession to which the central government of a State and an alien are parties or nonperformance by the State of the terms of such a contract or concession is wrongful:

(a) if the annulment or nonperformance is inconsistent with the law of the State as it existed at the time of the making of the contract or concession and is effected with the purpose of securing to the State or to other persons for its or their economic advantage benefits owed to the alien under the terms of the contract or concession;

(b) if the annulment or nonperformance constitutes a clear and discriminatory departure from the law of the State concerned:

(c) if the annulment or nonperformance constitutes an unreasonable departure from the principles of law which are generally recognized by municipal legal systems as applicable to governmental contracts or concessions; or

(d) if the annulment or nonperformance otherwise involves a breach by the State of an obligation under a treaty.

2. If the annulment or nonperformance by the State of a contract or concession to which the central government of a State and an alien are parties also involves the taking of property, the provisions of Article 10 shall apply to such taking.

3. The exaction from an alien of a benefit not within the terms of a contract or concession to which the central government of a State and the alien are parties or of a waiver of any term of such a contract or concession is wrongful if such benefit or waiver was secured through the use of any clear threat by the central government of the State to repudiate, cancel, or modify without legal justification, any right of the alien under such contract or concession.

4. The annulment or modification by a State, to the detriment of an alien, of any contract or concession to which the alien and a person or body other than the central government of a State are parties is wrongful:

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† Article 39 provides in general that damages shall be computed in the currency of the State of which the injured alien was a national at the time of the injury and shall be payable either in that currency or in another currency readily convertible into such currency at the rate of exchange prevailing at the date of the award or payment, whichever is more favorable to the claimant.

(a) if it constitutes a clear and discriminatory departure from the law of the State concerned;

(b) if it constitutes an unreasonable departure from the principles of law which are generally recognized by municipal legal systems as applicable to such contracts or concessions; or

(c) if it involves a breach by the State of an obligation under a treaty.

ARTICLE 32

(Damages for Taking and Deprivation of Use or Enjoyment of Property)

1. In case of a taking of property under paragraph 1 of Article 10, the property shall be restored to the owner and damages shall be paid for the use thereof.

2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10 shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the compensation required by that paragraph.

ARTICLE 34

(Damages for Annulment or Nonperformance of a Contract or Concession)

1. Damages for the annulment or nonperformance of a contract or concession under paragraphs 1 or 4 of Article 12 shall include compensation for losses caused and gains denied as the result of such wrongful act or omission or compensation which will restore the claimant to the same position in which the injured alien was immediately preceding such act or omission.

2. Damages for the exaction of a benefit not within the terms of a contract or concession or for the waiver of a term thereof under paragraph 3 of Article 12 shall include compensation for the benefit wrongfully exacted.

In their explanatory notes to the preliminary draft Professors Sohn and Baxter stated that "No attempt has been made in the drafting of this Convention to maintain a rigid distinction between the codification of the international law of State responsibility for injuries to aliens and the progressive development of that law." They have further indicated that "Where national views are at opposite poles, it has been thought wise to attempt compromises, even to the extent of laying down new law."

It is the view of this Committee that in attempting to compromise in respect of certain principles which the United States Government and the preponderance of international lawyers in this country have deemed fundamental to the protection of private investment abroad, the proposed Articles, far from improving the position of private investors from what it is in the present unsettled status of the law in this area, represent a step backward. The maintenance or (depending on one's view of the existing law) establishment of these principles which sustain private international investment is in this Committee's view vastly more important than achieving more widespread support among other countries for the proposed Convention. The

following changes proposed in the draft Articles by the Committee are in its opinion not only in the interest of the United States and other capital exporting countries, but of the underdeveloped countries seeking to encourage private investment within their borders. The proposed changes would also, in the Committee's opinion, be advantageous to the West in its economic competition with the Soviet Union, which benefits from any disparity in the legal protection given to foreign governmental as opposed to private investment.

The Committee's comments on certain sections of the Articles are as follows:

Article 10, Section 1(b). A taking should also be wrongful if it violates an express undertaking of the State. If the State agrees with a private investor as a condition of his investment that his property will not be taken, he, just as much as a government investor with whom (or as much as a private investor with whose Government) the State concludes a treaty,* should be entitled to restitution under Article 32, and not just damages.

Article 10, Section 2(b). It should be made clear that compensation will be in terms of the "fair value" if no "fair market value" exists and not merely where there is no "market value."

Article 10, Section 4. This Section permits the deferral of payment of full compensation and payment of part of the compensation in bonds of the taking government, if the taking is in furtherance of a "general program of economic and social reform." This represents the most striking departure in Article 10 from what the United States Government, and the preponderance of international lawyers in this country have regarded as established international law.

The classic statement of the classic principle that compensation must not only be adequate and effective but also *prompt* is that of Secretary of State Cordell Hull with reference to the Mexican Government's expropriation of agrarian properties of United States nationals pursuant to just such a "general program of economic and social reform":

> "The whole structure of friendly intercourse, of international trade and commerce, and many other vital and mutually desirable relations between nations indispensable to their progress rest upon the single and hitherto solid foundation of respect on the part of governments and of peoples for each other's rights under international justice. The right of prompt and just compensation for expropriated property is part of this structure."
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> * * *
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> "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under

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* Agreements between States may be treaties in the international sense whether or not they are treaties in the United States constitutional sense.

every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." III Hackworth. *Digest of International Law*, 657–659.

Over the years, the Department of State and the great majority of this country's international lawyers have remained constant in their adherence to these fundamental principles. In August 1953 the Department of State made the following statement to the Government of Guatemala in respect of that Government's expropriation of land belonging to an American company:

"Just compensation may be defined as that compensation which, as indicated in the previous Aide-Memoire of the United States on the present subject, is 'prompt,' is 'adequate,' and is 'effective'—otherwise the payment is not 'just.'

"Payment in bonds maturing in 25 years, with interest at 3 per centum per annum, and of uncertain market value is scarcely to be regarded as either prompt or effective payment. Many of the holders will realize little on the bonds in the course of their lives." 29 Department of State Bulletin 359 (1953).

Just last year, the then Legal Adviser of the Department of State urged American international lawyers "to strengthen the force and influence of the classic rule of just compensation" and "to counteract attacks upon this fundamental principle by those who would compromise it." In his view "partial compensation is a compromise with principle." He then went on to cite compensation in "long-term bonds," as an example, of an indirect attack on the principle of just compensation. 40 Department of State Bulletin 791 (1959).

Article 12. Probably no aspect of the law of States' international responsibility for injuries to aliens presents more difficulties, not only of principle but also of definition, than that relating to State contracts with aliens, and there is admittedly much difference of opinion among both governments and scholars as to the present status of the law in this area. This Committee is most appreciative of the problems which Professors Sohn and Baxter faced, and the draft Convention soundly declines to treat such contracts as being governed exclusively by the State's own law. Nevertheless, we find ourselves in serious disagreement with its approach, believing that it does not adequately hold States to their undertakings, particularly where a contract evidences the intention of the parties that it be subject to termination only in accordance with specified legal principles or arbitration procedures.

Section 1, which is the heart of Article 12, in practical effect legalizes the annulment or termination of contracts with foreign citizens (as contrasted with agreements with foreign governments or nationals of foreign governments having treaty protection) *unless* the alien meets the burden of proof of establishing one of four conditions:

Condition (a) requires, in the first place, a showing that the annulment

or nonperformance is "inconsistent" with the law of the State as it existed at the time of making the contract. While presumably intended to protect the alien against subsequent changes in the law on which he relied in entering into the contract, it will, as a practical matter, be very difficult to establish "inconsistency" unless at the time of contracting there was a clear provision in the State's constitution or other governing law, prohibiting its legislature or executive branch from annulling or requiring the State to perform its contracts. Moreover, even when this hurdle has been overcome, the alien must somehow show that the State's motive was "securing to the State or to other persons for its or their economic advantage benefits owed to the alien under the terms of the contract or concession."

Condition (b) requires both a "clear departure" from the existing law at the time of annulment or nonperformance and "discrimination." It is the law as it exists at the time of contracting that is of paramount importance to the alien, since there is no assurance that annulment or nonperformance may not be expressly authorized or even prescribed as a result of supervening legislative changes. However, by coupling the requirement of "clear departure" from existing law with "discrimination," the alien's protection against discrimination is destroyed provided only that the discrimination is authorized by, or at least does not constitute a "clear departure" from, the then existing law.

Condition (c) would require the injured alien to show what are the "principles of law which are generally recognized by municipal legal systems as applicable to government contracts or concessions" and that the departure from them had been "unreasonable." Of course, on a world-wide basis the vast majority of government contracts are with nationals of the contracting State, ranging from simple employment contracts to complex defense contracts, and the principles applicable to such contracts may or may not have any relevance to the principles that should govern investment or other typical contracts with aliens. Termination at any time at the option of the government, and renegotiation procedures, for example, are very usual provisions in defense contracts. The draft Article makes no attempt to differentiate the different standards that may or should be applicable to different categories of contracts. Finally, condition (d) will be of assistance to the injured private investor only in the small number of cases where his contract rights are guaranteed by a treaty between his State and the contracting State.

If the present structure of Section 1 is retained, the Committee would suggest that as a minimum the following changes be made: Condition (a) should be amended either to delete entirely the necessity for establishing the purpose of the annulment or nonperformance or to replace that portion of the condition with an exception in the case of partial nonperformance arising from nondiscriminatory legislation of general application only incidentally affecting the contract or concession in relation to areas in which the State has not expressly agreed to maintain conditions unchanged; condition (b) should be amended to provide, as a prior draft of the Convention provided, that the annulment or nonperformance is unlawful, if it results

from "discrimination against or ill will toward a particular alien, any category of aliens, or aliens in general"; condition (c) should be amended to provide that the applicable principles are those which are generally recognized by municipal legal systems as applicable to government contracts or concessions of the same general nature or category; condition (d) should be amended to include an annulment or nonperformance which involves a breach by the State of an obligation under the legal principle or principles, legal system or systems, or arbitration procedure or procedures, stated to be applicable by the terms of the contract or implicit in its nature. Thus, if the sovereign government agrees with the alien that the principle of *pacta sunt servanda* (agreements are to be kept) as it is understood in international law should be applicable to the contract, there could be no annulment or nonperformance other than such as would be justified in the case of obligations under treaties. Or, if, to take another example, it were provided that the parties could not terminate the contracts except pursuant to a stipulated arbitration procedure, the contracting State would be internationally obligated to terminate only in accordance with the arbitrators' decision. Finally, there should be added a final condition (e) declaring the wrongfulness of arbitrary annulment or nonperformance through exercise of sovereign power rather than through asserted rights under the contract.

Far better, however, than this attempt to shore up what the Committee considers a basically unsound structure would be to reverse the burden of proof which the proposed Article puts on the alien, and declare, as the basic proposition, that the fundamental principle of *pacta sunt servanda* is applicable to contracts between a State and an alien substantially as it is applicable to a contract between State and State. This basic principle may be made subject to such qualifications as may reasonably be necessary in respect of particular contracts, such as employment or other routine government contracts which are only coincidentally contracts with aliens and also (providing that their application to particular sets of facts is subject to review in an international or agreed tribunal) to principles such as fraud in the making, frustration and impossibility of performance, and, if not excluded expressly or by the nature of the contract, *rebus sic stantibus*.

Pacta sunt servanda is one of those basic principles which this Committee believes that American lawyers should uphold in its general application not only to treaties between States but also to contracts between aliens and States. That in so urging we are not as out of step with our colleagues in other countries as might be supposed from Article 12, as presently drafted, is made clear by the following resolution adopted by the International Law Association in the fall of 1958:

> "The 48th Conference of the International Law Association held at New York, 1958, having discussed at two sessions the First Report on Nationalization prepared by the Rapporteur of the Nationalization Committee, Dr. Ignaz Seidl-Hovenveldern, which comprises a collection of the views of members and the views of the Rapporteur . . ."
>
> ". . . declares that the principles of international law establishing the

sanctity of a State's undertakings and respect for the acquired rights of aliens require . . .

". . . that the parties to a contract between a State and an alien are bound to perform their undertakings in good faith. Failure of performance by either party will subject the party in default to appropriate remedies."

Respectfully submitted,

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THEODORE H. THIESING

July, 1960

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* Messrs. Jessup and Stokes, as members of the Advisory Committee consulted by the draftsmen of the Convention, prefer to abstain from published comment on the points covered in the above Report while the Convention is still in preliminary draft form. They join the Committee in urging careful consideration of these points by members of the Bar.

† Burton Raffel has requested that his dissent from the foregoing Report be noted. It is his belief that in the field of law to which the draft Convention relates there are not in fact any established, fundamental principles and he is not sure whether there can or should be any. Moreover, he is of the view that a sovereign cannot be bound (except with respect to another sovereign) as a private person can be. He is, therefore, of the view that it may well be to the interest of both investor and invested-in nations to preserve as much flexibility as possible and to seek concrete application of justice in concrete situations rather than to attempt to prescribe rules of international responsibility of general applicability.

COMMITTEE ON PROFESSIONAL ETHICS

OPINION NO. 846

Question: An attorney wishes to know whether he may act as a money lender mortgagee, charging at the rate of 6% per annum, and in addition perform for a fee certain incidental legal services such as obtaining the assignment from the present mortgagee, drawing the extension agreement, etc. He also asks what a reasonable fee would be for such services so that he would not be in violation of the usury laws.

Opinion: This inquiry involves two questions, (1) whether it is professionally proper for you to represent a client in a transaction pursuant to which you personally loan the client money to be secured by a mortgage and (2) whether there would be any violation of the usury laws if you loaned

the client money at 6% interest and also required him to pay a reasonable legal fee for obtaining an assignment from the present mortgagee and other matters incidental to the transaction.

The second question as we see it poses a legal question and not a question under the Canons of Ethics. This Committee does not pass on questions of law, hence we do not purport to pass on the question whether you could properly require the borrower to pay to you the equivalent of a reasonable fee where you have acted as your own counsel.

The first question, however, we do think poses a question under the Canons of Ethics. You would obviously be in the position of representing conflicting interests, namely, your own interests as the lender and the interests of the client as the borrower and mortgagor. While Canon 6 does not contain a flat prohibition against representation of conflicting interests (i.e., it is permitted "by express consent of all concerned given after a full disclosure of the facts"), we think it a salutary rule and one implicit in the spirit of the Canons that a lawyer should never undertake to represent or advise a party with respect to transactions between that party and the lawyer himself. We think this is so even though it may be proper to represent conflicting interests where neither of those interests is personal to the lawyer. A lawyer is presumed to have a peculiar advantage by reason of his professional training and should never place himself in a position where there would be the slightest temptation to use it to his own personal advantage, or for that matter, where there could be the slightest suspicion that he might do so.

June 6, 1960

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